

# PUBLIC POLICY IN INTERNATIONAL INVESTMENT AND TRADE LAW: COMMUNITY EXPECTATIONS AND FUNCTIONAL DECISION-MAKING

*Diane A. Desierto*<sup>\*</sup>

I.	INTRODUCTION: DIFFERENCES BEYOND METAPHOR .....	52
II.	TEXTS, APPLIERS AND STRUCTURE: NONLINEAR INTERPRETATION OF THE “PUBLIC INTEREST” AND HUMAN RIGHTS .....	72
	A. <i>Hard and Soft Texts: Bases of Obligation in WTO Law</i> <i>Vis-à-vis International Investment Law</i> .....	72
	1. WTO Law .....	72
	2. Investment Law .....	84
	B. <i>Authoritative Decision-Makers and Interpretive</i> <i>Communities in WTO Law Vis-à-vis Investment Law</i> .....	99
	1. WTO Law .....	99
	2. Investment Law .....	107
III.	TWO VISIONS OF REGULATORY FREEDOM TO ACHIEVE PUBLIC POLICY AND HUMAN RIGHTS OBJECTIVES.....	117
	A. <i>Clarifying Frames of Reference: WTO Law</i> .....	117
	B. <i>Checking Criteria for Comparator Applicability:</i> <i>Investment Law</i> .....	123
IV.	HUMAN RIGHTS AS A WORK IN PROGRESS: THE UNCERTAIN SUCCESS OF WTO LAW’S POST-NEOLIBERAL PUBLIC POLICY PARADIGM .....	133
	A. <i>Viewing Human Rights in the WTO as a</i> <i>Sociological Project</i> .....	133

---

<sup>\*</sup> Assistant Professor of Law, University of Hawai’i William S. Richardson School of Law, Honolulu, USA; JSD, LLM, Yale Law School, JD *cum laude class salutatorian* and BSc Economics *summa cum laude class valedictorian*, University of the Philippines. I am grateful to Prof. Dr. Armin von Bogdandy, Managing Director of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany, for hosting my research under a 2013 Visiting Research Fellowship. Thanks are due as well to Dr. Stephan Schill, Prof. Rob Howse, Prof. Tai-heng Cheng, and Prof. W. Michael Reisman for comments and exchanges on this work. All errors are solely my own. I may be reached at [desierto@hawaii.edu](mailto:desierto@hawaii.edu) and [dianedesierto@aya.yale.edu](mailto:dianedesierto@aya.yale.edu). Paper written for the International Trade and Investment Panel in the April 12, 2013 Symposium, “Solving Global Problems: Perspectives from International Law and Policy,” New York Law School Law Review and Institute of Global Law, Justice & Policy.

B. <i>Human Rights Impact Assessments and Interdisciplinarity</i> .....	136
V.   MEDIATING THE ICESCR: A HEURISTIC FOR FUNCTIONAL DECISION-MAKING IN WTO LAW AND INVESTMENT LAW .....	140
A. <i>ICESCR and WTO Law</i> .....	141
B. <i>ICESCR and Investment Law</i> .....	145
CONCLUSION: RESTRAINING A FORCED JOINDER .....	148

[T]here is nothing in the interests protected by international law which is fundamentally different from those protected by municipal and private law . . . It might be said that interests of individuals are chiefly economic, whereas those of States are political in character; but even if this be so, it ought not to be forgotten that, as a rule, the political activities of States in the field of international relations are primarily devoted to safeguarding collective economic interests, no matter under what disguise they happen to appear.

– SIR HERSCH LAUTERPACHT (1927)<sup>1</sup>

It is a truism that all law is policy, in the sense that every legal arrangement, however humble, procedural, or “technical” it may seem, has been designed in order to achieve some preferred social or economic objective, including objectives about the structure of the decision-making process itself.

– W.M. REISMAN (2012)<sup>2</sup>

## I. INTRODUCTION: DIFFERENCES BEYOND METAPHOR

It is a proposition frequently asserted—sometimes argued in the tenor of self-evident truth—in contemporary international economic law scholarship that WTO law is always instructive for international investment law.<sup>3</sup> The proposition seems intuitive when one visualizes a

---

1. HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* 72–73 (WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION) (Archon Books, reprint 1970) (Longmans, Green and Co. Ltd., 1927).

2. W. MICHAEL REISMAN, *THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT*, at 28–29 (2007 General Course on Public International Law, Hague Academy of International Law) (Martinus Nijhoff 2012).

3. The degree of WTO influence on, and authoritativeness for, investment law, remains much a matter of debate. See, e.g., Melaku Gebeye Desta, *GATT/WTO Law and International Standards: An Example of Soft Law Instruments Hardening Up?*, in *INTERNATIONAL INVESTMENT*

straightforward transactional linkage between trade and investment. Intra-firm transnational trading, for example, simultaneously involves issues of inter-State foreign market access (between the State of the parent firm and the State of the affiliate firm), as well as the establishment of an investment in the host State (through the creation of the affiliate firm responsible for direct operations).<sup>4</sup>

Viewed from fundamental principles of economics, however, the trade-investment relationship might not seem as immediately obvious. Modern neoclassical trade theory uses the Ricardian theory of comparative advantage and the basic factor proportions model<sup>5</sup> to show how the incentive structure (and thus, the decision to trade or exchange) depends on factor intensities and resource endowments between States

---

LAW AND SOFT LAW 148–90 (Andrea K. Bjorklund & August Reinisch eds. 2012); David Collins, *A New Role for the WTO in International Investment Law: Public Interest in the Post-Neoliberal Period*, 25 CONN. J. INT'L L. 1 (2009); Anastasios Gourgourinis, *Lex Specialis in WTO and Investment Protection Law*, 53 GERMAN Y.B. INT'L L. 579 (2010); Robert Howse et al., *The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz*, 20 EUR. J. INT'L L. 1087 (2010); Jürgen Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20 EUR. J. INT'L L. 749 (2009); Andrew Mitchell & Caroline Henckels, *Variations on a Theme: Comparing the Concept of 'Necessity' in International Investment Law and WTO Law*, CHI. J. INT'L L. (forthcoming 2013); Levent Sabanogullari, *Most Favoured Nation Treatment in International Trade and Investment Law – Comparing Apples and Oranges?*, 8 TRANSNAT'L DISP. MGMT. 3 (2011); Greg Tereposky & Morgan Maguire, *Utilizing WTO Law in Investor State Dispute Settlement*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2010, at 247–83 (Arthur Rovine ed., 2011).

4. See Arwel Davies, *Scoping the Boundary Between the Trade Law and Investment Law Regimes: When Does a Measure Relate to Investment?*, 15 J. INT'L ECON. LAW 793 (2012).

5. Mordechai E. Kreinin & Michael G. Plummer, *Economic Principles of International Trade*, ch. 37, 3–22, at 6, in THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC, AND POLITICAL ANALYSIS VOL. II (Patrick F.J. Macrory et al. eds., 2005).

In sum, each country exports the commodities that are relatively intensive in the factor with which it is relatively well endowed. That is how it acquires a comparative advantage in these commodities. . . . this model has considerable explanatory power. One of its implications is that each country exports the “factor services” of its abundant factor, as embodied in the bundle of its export goods, and imports the “factor services” of its abundant factor, as embodied in the bundle of its import goods. (Commodity trade and factor movements, therefore, are substitutes, as a country can either export its factor services or its factors.) Thus, trade raises the demands for, and the price of the abundant factor, and lowers the demand for, and the price of, the scarce factor. The effect of trade on the country's income distribution is at the heart of the controversy over free trade versus protectionism in many countries: the scarce factor lobbies for protectionism, to minimize its losses. Likewise, factors employed in the export industries gain from trade, and those employed in import-competing industries lose.

(e.g., the relative capital/labor ratios in two States in relation to the bundle of commodities produced). Theories of foreign direct investment (FDI), on the other hand, attribute firms' decisions to invest abroad to either of the following: (1) the nature of business operations in a production cycle (e.g., innovation, growth, maturity and decline); (2) the effect of exchange rates on imperfect capital markets (e.g., stronger currencies tend to reduce the volume of FDI); (3) the processes of internalization (e.g., FDI occurs when firm-specific advantages outweigh the costs of outsourcing operations abroad); or (4) the eclectic theory of firms' advantages (e.g., ownership advantages, location advantages, internalization advantages) that create a sufficient incentive for foreign direct investment, as opposed to other transactional options available to such firms.<sup>6</sup>

The transactional differences between trade and investment thus translate into different sets of respective determinants for international investment (capital) flows and international trade flows. The International Monetary Fund's key 1991 global survey and analysis of the determinants of global capital flows identified three major determinants that significantly influence firms' decisions to invest (whether in a direct manner through the establishment of operations in the host State, or through indirect forms such as equity, securities, or other types of portfolio investment): (1) economic fundamentals (e.g., "global investment opportunities available, the covariances between expected returns on various investments, the growth of wealth in different countries, and differences across economic agents in their willingness to assume risk and in rates of time preference"); (2) relevant official policies (e.g., tax policies; official guarantees; capital controls; limitations on the entry of foreign firms into domestic markets; restrictions on the domestic activities, products, locations and interest rates charged by financial institutions; misaligned real exchange rates; restrictive trade policies; debt-servicing arrears and reschedulings; and unstable macroeconomic policies"); and (3) market distortions (e.g., "transaction costs and asymmetric information among market participants").<sup>7</sup> On the other hand, a World Bank report identifies

---

6. Vintila Denisia, *Foreign Direct Investment Theories: An Overview of the Main FDI Theories*, 3 EUR. J. INTERDISC. STUD. 53, 55–57 (2010). There are of course more new theories of FDI decision-making. See also IMAD A. MOOSA, *FOREIGN DIRECT INVESTMENT: THEORY, EVIDENCE, AND PRACTICE* (2002); A.L. Calvet, *A Synthesis of Foreign Direct Investment Theories and Theories of the Multinational Firm*, 12 J. INT'L BUS. STUD. 43 (1981); Olga Vasyechko, *A Review of FDI Theories: An Application for Transition Economies*, 89 INT'L RES. J. FIN. & ECON. 118–37 (2012).

7. Morris Goldstein et al., *Determinants and Systemic Consequences of International Capital Flows*, in DETERMINANTS AND SYSTEMIC CONSEQUENCES OF INTERNATIONAL CAPITAL FLOWS: A STUDY BY THE RESEARCH DEPARTMENT OF THE INTERNATIONAL MONETARY FUND 1, 19–24 (International Monetary Fund, Occasional Paper No. 77, Mar. 1991) [IMF FEE].

different determinants of global trade flows, composed of the traditional variables of factor endowments (e.g., capital/labor ratios and resource endowments) and exchange rate spreads between States,<sup>8</sup> as well as several new determinants that have been observed from cross-country data (e.g., productivity differences, consumer preferences, scale returns and technology, increase in mean incomes, improvements in information and communication technology or infrastructure, and trade intensity as affected by country size and trade barriers).<sup>9</sup>

Given these conceptual differences, it is unsurprising that the separate and distinct international economic transactions of trade and investment are governed by distinct international regulatory architectures which, while sharing some early “common roots,” ultimately demonstrated “diverging evolutions.”<sup>10</sup> As Nicholas Di Mascio and Joost Pauwelyn observed in 2008:

The trade regime is about overall welfare, efficiency, liberalization, state-to-state exchanges of market access, and trade opportunities – not individual rights . . . [while] the traditional investment regime is about fairness grounded in customary rules on treatment of aliens, not efficiency. It is about protection, not liberalization, and about individual rights, not state-to-state exchanges of market opportunities.<sup>11</sup>

The regulatory content for international trade, as opposed to that which has evolved for international investment, has understandably been designed with consideration for the particularity of each subject-matter to be regulated, as well as the respective policy purposes behind each sphere of regulation.<sup>12</sup>

8. See Marianne Baxter & Michael A. Kouparitsas, *What Determines Bilateral Trade Flows?*, NBER Working Paper 12188, Apr. 2006, available at <http://cid.bcrp.gob.pe/biblio/Papers/NBER/2006/Abril/w12188.pdf> (last accessed Jan. 10, 2013); Eswar S. Prasad & Jeffery A. Gable, *International Evidence on the Determinants of Trade Dynamics*, 45 IMF Staff Papers 401 (Sept. 1998), available at <http://www.perjacobsson.org/external/Pubs/FT/staffp/1998/09-98/pdf/prasad.pdf> (last accessed Jan. 10, 2013).

9. Julien Gourdon, *Explaining Trade Flows: Traditional and New Determinants of Trade Patterns*, CERDI, *Etudes et Documents E* 2007.06, available at <http://halshs.archives-ouvertes.fr/docs/00/55/71/25/PDF/2007.06.pdf> (last accessed Jan. 10, 2013).

10. Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 1 48, 51–53 (Jan. 2008).

11. *Id.* at 54–56.

12. See David P. Baron, *Design of Regulatory Mechanisms and Institutions*, in HANDBOOK OF INDUSTRIAL ORGANIZATION, vol. II, ch. 24 1347, 1349, (R. Schmalensee & R.D. Willig eds. 1989).

Regulation involves government intervention in markets in response to some

Nonetheless, it would be quite unrealistic to deny the existence of any nexus whatsoever between trade regulation and foreign investment rules.<sup>13</sup> However, as I caution in this Article, it is also dangerous to hyperbolize the influence of the former regime on the latter, or to mechanistically design public policy solutions in international investment law by mere transplant of the public policy interpretations, methodological approaches, and institutional solutions that have uniquely evolved within international trade law, and which, to date, have mostly achieved a mixed record of success.<sup>14</sup> The obstacles to the automatic transplantation of WTO law into investment law are neither imagined nor speculative. For one, investment treaty texts may not necessarily possess the same linguistic elasticity as trade treaty

---

combination of normative objectives and private interests reflected through politics. Whatever objective the regulation is intended to achieve, the regulator must choose policies tailored to the particular regulatory setting and to the characteristics of the firms subject to its authority. In choosing those policies, the regulator must take into account the strategies the firm might employ in response to those policies.

*Id.*

13. See MICHAEL TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 444 (3d ed. Routledge):

There is a complex interaction between foreign investment and trade protection. First of all, foreign investment may occur as a means of jumping tariff walls or avoiding harassment of imports under the trade remedy laws of the host country (so-called "cooperative protectionism"). If much of its comparative advantage is portable, consisting of know-how, processes and technology, a company may avoid border restrictions simply by manufacturing within the domestic market. Enhanced access to host-country markets generally ranks high among the factors that industries cite as reasons for foreign investment.

*Id.*

14. On the debate regarding the WTO's favorable or unfavorable impact and record on human rights and public interest protection, see Alan O. Sykes, *International Trade and Human Rights: An Economic Perspective*, (John M. Olin L. & Econ. Working Paper No. 188, 2003), available at [http://www.law.uchicago.edu/files/files/188.aos\\_human-rights.pdf](http://www.law.uchicago.edu/files/files/188.aos_human-rights.pdf) (last accessed Jan. 10, 2013); Robert D. Anderson & Hannu Wager, *Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy*, 9 J. INT'L ECON. L. 3 (2006), 707-47, available at <http://jiel.oxfordjournals.org/content/9/3/707.full.pdf+html>; HOLGER P. HESTERMEYER, *HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES* (2007); Peter Hilpold, *WTO Law and Human Rights: Bringing Together Two Autopoietic Orders*, 10 CHINESE J. INT'L L. 323-72 (2011), available at <http://chinesejil.oxfordjournals.org/content/10/2/323.full.pdf+html?sid=a3056730-1db0-4cd4-8acf-247574fc4c25>; JAMES HARRISON, *THE HUMAN RIGHTS IMPACT OF THE WORLD TRADE ORGANIZATION* 17-68 (2007); SARAH JOSEPH, *BLAME IT ON THE WTO? A HUMAN RIGHTS CRITIQUE* 7-141 (2011); Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753-814 (2002).

provisions.<sup>15</sup> Investment arbitration tribunals, operating as they do under the parameters of a specific and limited mandate to resolve a particular dispute, may find that their jurisdictional competence cannot easily echo the broad judicial functions of the WTO Appellate Body,<sup>16</sup> even if both types of tribunals adhere to some sense and understanding of a *jurisprudence constante*.<sup>17</sup> Finally, grafting WTO law onto investment law would have to reckon with how this proposal would be received within the different strategic bargaining dynamics in the investment law system's usual triage of a host State, its constituents, and a prospective foreign investor,<sup>18</sup> as opposed to the predominantly inter-State bargaining dynamics within the complex, "multilevel," and constitutionalized system<sup>19</sup> in the WTO.<sup>20</sup>

Notwithstanding these contextual differences, it is curious that there

---

15. See Diane A. Desierto, *Necessity and Supplementary Means of Interpretation of Non-Precluded Measures in Bilateral Investment Treaties*, 31 U. PA. J. INT'L L. 827, 882–94 (2010); Jose E. Alvarez & Tegan Brink, *Revisiting the Necessity Defense*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2010–2011 (Karl P. Sauvant ed., 2012).

16. See Barton Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 231, 235 (Karl P. Sauvant ed., 2008); Asif H. Qureshi, *An Appellate System in International Investment Arbitration?*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1155, 1165, (Peter Muchlinski et al. eds., 2008). On the international judicial function of the WTO Appellate Body, see ISABELLE VAN DAMME, *TREATY INTERPRETATION BY THE WTO APPELLATE BODY* 159–64 (2009) (noting that, under the "principle of *non ultra petita*," the WTO panels and Appellate Body "should not decide more than is covered by their jurisdiction in a particular dispute . . . [t]he exception to this principle in appellate review is that the Appellate Body may review the exercise of inherent powers by panels, even in the absence of a claim to that effect." VAN DAMME, *supra*, at 160).

17. See Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014–49 (2007); Andrea K. Bjorklund, *Investment Treaty Arbitral Awards as Jurisprudence Constante*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265–80 (Colin B. Picker et al. eds., 2008).

18. See Tai-Heng Cheng, *Power, Authority, and International Investment Law*, 20 AM. U. INT'L L. REV. 465 (2005); Anne van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. INT'L ECON. L. 507 (2009), available at <http://jiel.oxfordjournals.org/content/12/2/507.full.pdf+html?sid=ab78494f-ae8-48e5-bf62-52d2f1b03a7b>; JAN PETER SASSE, *AN ECONOMIC ANALYSIS OF BILATERAL INVESTMENT TREATIES* 67–123 (2011); Stephania Bonilla & Rosa Castro, *A Law and Economics Analysis of International Investment Treaties: Latin America*, Oct. 2006 unpublished paper, available at [http://www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1007684](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1007684) (last accessed Jan. 10, 2013).

19. Famously coined and conceptualized by Ernst-Ulrich Petersmann. See Among Others Ernst-Ulrich Petersmann, *Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism*, in CONSTITUTIONALISM 5–58 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2011); ERNST-ULRICH PETERSMANN, *INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY: CONSTITUTIONAL PLURALISM AND MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS* 2–7 (2012).

20. See generally KYLE BAGWELL & ROBERT W. STAIGER, *THE ECONOMICS OF THE WORLD TRADING SYSTEM* (2002).

remains an enduring scholarly purchase to the proposition that WTO law is always instructive for investment law. To some, importing trade interpretations into investment treaty standards ultimately means taking a crucial ideological position favoring the discursive unity, rather than normative fragmentation, of international law in general.<sup>21</sup> Where one accepts this theoretical prism of unity and the coherence of international economic law (IEL) as a system<sup>22</sup> (or for that matter, IEL's unity with international law at large),<sup>23</sup> it would seem that there is nothing at all

---

21. Among the voluminous literature on the subject of fragmentation *vis-à-vis* unity between international trade and international investment law, see Jose Manuel Alvarez-Zarate, *Searching for Coherence in Trade and Investment Arbitration: Domestic Policies under Siege*, Working Paper No. 2012/48, Society of International Economic Law Global Conference, July 2012, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2102665](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102665) (last accessed Jan. 10, 2013); RAFAEL LEAL-ARCAS, *INTERNATIONAL TRADE AND INVESTMENT LAW: MULTILATERAL, REGIONAL AND BILATERAL GOVERNANCE* ch. 1 (2011) (Introduction); Jürgen Kurtz, *The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* ch.8 (Stephan W. Schill ed., 2010); David Schneiderman, *Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?*, J. INT'L DISPUTE SETTLEMENT 1, 20 (2011), available at <http://jids.oxfordjournals.org/content/2/2/471.full.pdf+html?sid=8f094943-182f-4133-9742-a3467ea56f70>.

It is worth underscoring that having resort to the WTO system is to seek out reinforcements entirely in sync with the project of spreading economic liberalism worldwide. Having recourse to the world trading regime precedent is to look for a reliable and steady ally whose international rationality differs little from the investment rules regime.

*Id.*; Julien Chaisse & Philippe Gugler, *Foreign Investment Issues and WTO Law – Dealing with Fragmentation While Waiting for a Multilateral Framework*, in *ESSAYS ON THE FUTURE OF THE WORLD TRADE ORGANIZATION* 135–71 (Julien Chaisse & Tiziano Balmelli eds., 2008).

22. See Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33 (1996); Ernst-Ulrich Petersmann, *Human Rights and International Economic Law in the 21st Century: The Need to Clarify Their Interrelationships*, 4 J. INT'L ECON. L. 3–39 (2001), available at <http://jiel.oxfordjournals.org/content/4/1/3.full.pdf+html?sid=38d71102-c873-4a2f-b2f3-61a7f4ecd1e>; Bradley J. Condon, *Trade, Environment and Sovereignty: Developing Coherence Between WTO Law, International Environmental Law, and General International Law*, unpublished Ph.D. Thesis (2004), available at <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1018&context=theses> (last accessed Jan. 10, 2013); Thomas Cottier et al., *Introduction: Fragmentation and Coherence in International Economic Regulation: Analysis and Conceptual Foundations*, in *THE PROSPECTS OF INTERNATIONAL TRADE REGULATION: FROM FRAGMENTATION TO COHERENCE* 1, 52 (Thomas Cottier & Panagiotis Delimatsis eds., 2011).

23. On the general systems coherence of international law despite the proliferation of numerous functional and specialized regimes, see Christian Tomuschat, *International Law as a Coherent System: Unity or Fragmentation?*, in *LOOKING TO THE FUTURE: ESSAYS IN HONOR OF W. MICHAEL REISMAN* 323–54 (Mahnoush H. Arsanjani et al., 2010). An incipient proposal suggests transposing systems theory into the analysis of international investment law. See Julia Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, unpublished draft for the ASIL International Economic Law Interest Group dated Nov. 16, 2012,



unusual in the rising clamor for international investment law to increase its receptiveness to trade law.<sup>24</sup> Tomer Broude has recently gone so far as to argue in favor of the pure consolidation of international trade and investment law into one system of law altogether, stressing that:

The regulation of trade and the law of investment have inevitably gravitated towards each other, drawing on their common genetic makeup. However, the convergence is far from true consolidation. Rather, it is piecemeal and unplanned, lacking a unifying logic . . . . From a policy perspective, it seems difficult to justify such a continued bifurcation. [In regard to] subsidies, one wonders if it makes any sense to effectively proscribe subsidies that influence the physical movement of goods as inefficient, while at the same time, at least by default, sanctioning subsidies that create an inefficient global allocation of investment resources. Much the same could be said about other specific areas of regulation – discriminatory treatment of goods and services compared to discriminatory treatment of investment; the treatment of intellectual property as trade-related issues when they are no less related to international investment; increased access to goods and services markets when access to capital markets remains constrained; incongruous limitations on trade and investment-related based on the same “non-economic” considerations; differences between regional trade arrangement and regional investment structures. The list goes on.<sup>25</sup>

Evidently, the tribe of enthusiasts for some kind of “systemic integration”<sup>26</sup> between WTO law and investment law is increasing. The academic literature alone is rife with many innovative WTO law *qua* investment law proposals. On one end of the spectrum, there are those who concede a minimum of normative and ideological convergence

---

available at [http://www.asil.org/iel\\_biennial/files/Maupin%20paper.pdf](http://www.asil.org/iel_biennial/files/Maupin%20paper.pdf) (last accessed Jan. 10, 2013).

24. Jose Manuel Alvarez-Zarate, *Searching for Coherence in Trade and Investment Arbitration: Domestic Policies Under Siege*, (Soc’y of Int’l Econ. Law Working Paper No. 2012/48, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2102665](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102665).

25. Tomer Broude, *Investment and Trade: The ‘Lottie and Lisa’ of International Economic Law?* (Hebrew Univ. of Jerusalem Legal Studies Res. Paper No. 10-11), in *NEW DIRECTIONS AND EMERGING CHALLENGES IN INTERNATIONAL INVESTMENT LAW AND POLICY* 12, 19 (Pierre Sauve & Robert Echandi eds., 2012).

26. The coinage and concept is attributable to Professor Campbell McLachlan. See Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT’L & COMP. L.Q. 279–320 (2005), available at <http://journals.cambridge.org/action/displayFulltext?type=1&pdfType=1&fid=1531876&jid=ILQ&volumeId=54&issueId=02&aid=1531868>.

between WTO law and investment law—at least enough to regard WTO law as having some “persuasive” effect on the interpretation and application of investment treaty norms.<sup>27</sup> Some plumb the conceptual commonalities between substantive standards in investment treaties (such as the most favored nation clause and the national treatment clause) with their trade law counterparts, to push for a shared normative interpretation within a broader epistemic and interpretive community of law-appliers.<sup>28</sup> At the opposite extreme, there are those who find little or no conceptual divide between WTO law and investment law, such that WTO law and jurisprudence may, ought, or should be incorporated as much as possible as “authoritative” sources of law in the interpretation

---

27. See Andrew D. Mitchell & Caroline Henckels, *Variations on a Theme: Comparing the Concept of ‘Necessity’ in International Investment Law and WTO Law*, 14 CHI. J. INT’L L. 93 (2013) (proposing the adoption of judicial methodologies developed by WTO panels, particularly proportionality analysis for necessary measures in GATT exceptions); Thomas Klein, *Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*, in INTERNATIONAL JUDICIAL LAWMAKING 251, 274–77 (Armin von Bogdandy & Ingo Venzke eds., 2012); ROLAND KLÄGER, ‘FAIR AND EQUITABLE TREATMENT’ IN INTERNATIONAL INVESTMENT LAW 104–12 (2011) (advocating an “integrative” interpretation of the FET standard that could include references to WTO law); Robert Howse, *The Relevance of WTO Law and Jurisprudence to Investor-State Dispute Settlement*, Notes for Panel Discussion, Investment Treaty Forum, British Institute for International and Comparative Law, Sept. 9, 2011, available at [http://www.biiicl.org/files/5638\\_robert\\_howse.pdf](http://www.biiicl.org/files/5638_robert_howse.pdf) (last accessed Jan. 10, 2013) (noting specific investment treaty concepts and principles originating from the GATT/WTO *acquis* and the dangers of re-litigation of the same issues in parallel trade *vis-à-vis* investment arbitration proceedings, but also cautioning that “the use of WTO law and jurisprudence in investor-state dispute settlement requires careful attention to contextual differences and a range of other considerations”). Although note that arguments have been advanced in favor of a strict separation between WTO law and investment law. See Cesar Giovanni Chaparro Rincon, *The Relationship Between International Investment Agreements and the WTO Legal System – Conflicts and Sustainable Development*, 8 TRANSNAT’L DISP. MGMT. 33–42 (2011) (finding that “complementary relationship between WTO [law] and IIA [international investment agreement] is unfeasible”).

28. KLÄGER, *supra* note 27, at 110; Michael Ewing-Chow, *Thesis, Antithesis and Synthesis: Investor protection in BITs, WTO and FTAs*, 30 U. NEW S. WALES L.J. 548–71 (2007); Martins Paparinskis, *Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law*, in MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW 259–88 (Tomer Broude & Yuval Shany eds., 2011); Jürgen Kurtz, *The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW ch. 8 (Stephan W. Schill ed., 2010); Gaetan Verhoosel, *The Use of Investor-State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*, 6 J. INT’L ECON. L. 493, 503–06 (2003) (arguing that WTO law and jurisprudence are relevant external rules to international investment treaties, applying Article 31(3)(c) of the Vienna Convention on the Law of Treaties). On fundamental conceptual differences between the assessment of discrimination in WTO law as opposed to that undertaken in investment law, see Thomas Wälde, *The Serbian Loans Case – A Precedent for Investment Treaty Protection of Foreign Debt?*, INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 383, 411–14 (Todd Weiler ed., 2005).

of investment treaties.<sup>29</sup> Full convergence and cross-fertilization between WTO law and investment law, according to this view, would

---

29. Mitchell & Henckels, *supra* note 27. For the famous investment law case that directly used WTO law to interpret investment treaty norms, see *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award of Sept. 5, 2008, ¶¶ 192–94 (using GATT Article XX exceptions to interpret Article XI of the Argentine-U.S. bilateral investment treaty). Other tribunals have not gone as far as the *Continental Casualty* tribunal in directly incorporating WTO law and jurisprudence to interpret an investment treaty norm. For example, the interpretation of WTO law of national treatment was not deemed pertinent by the tribunal in *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. U.N. 3467, Award of July 1, 2004, ¶¶ 173–76.

The Tribunal is mindful of the discussion of the meaning of “like products” in respect of national treatment under the GATT/WTO. In that context it has been held that the concept has to be interpreted narrowly and that like products are related to the concept of directly competitive or substitutable products . . . . However, those views are not specifically pertinent to the issue discussed in this case. In fact, the purpose of national treatment in this dispute is the opposite of that under the GATT/WTO, namely it is to avoid exporters being placed at a disadvantage in foreign markets because of the indirect taxes paid in the country of origin, while in GATT/WTO the purpose is to avoid imported products being affected by a distortion of competition with similar domestic products because of taxes and other regulations in the country of destination.

*Id.* The tribunal in *International Thunderbird Gaming Corporation v. Mexico*, Ad hoc (UNCITRAL), Award of Jan. 26, 2006, ¶ 37 acknowledged the further development of the concept of “transparency” and “legitimate expectations” in WTO law and jurisprudence. In *Canfor Corporation v. United States*, Ad hoc (UNCITRAL), Decision on Preliminary Question June 6, 2006, ¶ 183, the tribunal took into account the fundamental principle that the North American Free Trade Agreement (NAFTA) reflects “compatibility with GATT/WTO law.” WTO law was cited as an additional source to provide evidence of the existence of the general principle of good faith in *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award of Apr. 15, 2009, ¶ 77. The tribunal in *Methanex Corporation v. United States*, Ad hoc (UNCITRAL), Final Award on Jurisdiction and Merits, Aug. 3, 2005, ¶¶ 5–6, was careful to avoid adjudicating allegations that the United States had violated GATT law, but initially conceded that

[w]hen it comes to interpreting the provisions of Section A of Chapter 11, in particular in the instant case Article 1102, the Tribunal may derive guidance from the way in which a similar phrase in the GATT has been interpreted in the past. While such interpretations cannot be treated by this Tribunal as binding precedents, the Tribunal may remain open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant. If (as appears to be the case) Methanex’s argument amounts to no more this, it accords with the approach taken by the Tribunal.

*Id.* (emphasis added). Ultimately, the tribunal’s textual examination of NAFTA Article 1102 revealed that the incorporation of GATT criteria on “like goods” had not been intended by the NAFTA drafters: “the intent of the drafters to create distinct regimes for trade and investment is explicit in Article 1139’s definition of investment” (*Methanex*, ¶¶ 33–35).

ostensibly cure further “fragmentation” and abate growing “dissonance” among arbitral tribunals within the international investment law regime.<sup>30</sup>

Apart from the foregoing ideological motivations, acceptance of the WTO law *qua* investment law proposition also unmask certain methodological and institutional preferences. Some endorse the interpretive methodologies of WTO panels or the Appellate Body to investment arbitrators dealing with open-textured or ambiguous treaty clauses such as non-precluded measures or necessity.<sup>31</sup> Others hold up the centralized system of interpretation in the WTO as the functional paradigm to be emulated by the diffuse and decentralized investment law regime.<sup>32</sup> In recent years, some investment treaty-making practices have started reflecting States’ decisions to favor direct incorporation of, or specific reference to, trade law provisions within investment treaties.<sup>33</sup>

---

30. Of course, this assumes that “dissonance” among investment arbitral awards is itself a problem, in the first place, and not merely an expected phenomenon in a treaty regime governed by a universe of over 3000 international investment agreements to date. It has been argued that this dissonance is characteristically expected of the particular “system design” for investment law. See R. Doak Bishop & Margrete Stevens, *A Systemic Perspective of the Foreign Investment Dispute Settlement System: Feedback, Adaptation, and Stability*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2011, at 25–59 (Arthur W. Rovine ed., 2012). It has also been proposed that dissonance in the international investment law regime can be overcome internally by adopting a public law conceptual perspective in investment treaty arbitration. See Stephan W. Schill, *Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT’L L. 57, 78–85 (2011).

31. Mitchell & Henckels, *supra* note 27. See also Alberto Alvarez-Jimenez, *New Approaches to the State of Necessity in Customary International Law: Insights from WTO Law and Foreign Investment Law*, unpublished paper, available at <http://biblioteca.ucp.edu.co/OJS/index.php/paginas/article/viewFile/916/838>. ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 504 (2009) (“IIA tribunals should consider applicable interpretive principles drawn from WTO jurisprudence on Article XX GATT . . .”). For a regime-specific analysis of methodologies in WTO jurisprudence regarding necessity exceptions, see Benn McGrady, *Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures*, 12 J. INT’L ECON. L. 153 (2009), available at <http://jiel.oxfordjournals.org/content/12/1/153.full.pdf+html?sid=dfd01605-e443-4de3-b09d-6931c26f8c31>.

32. Collins, *supra* note 3, at 3–4 (“WTO principles may further some of the key public interest issues that could arise in the investment context . . . the inclusive and internally coherent nature of WTO dispute settlement is more responsive to public interest concerns than the private, largely inconsistent commercial arbitration of investment disputes.”); NEWCOMBE & PARADELL, *supra* note 31, at 503–04. On the increasing resort to WTO/GATT language for new generations of investment treaty standards, see Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT’L ECON. L. 1037 (2010), available at <http://jiel.oxfordjournals.org/content/13/4/1037.full.pdf+html?sid=83d81b7c-8c86-4328-82c6-d839eff90f92>.

33. See, e.g., ASEAN Comprehensive Investment Agreement arts. 17–18 (reproducing

It is not my intent to seek a sharp and indissoluble line of separation between WTO law and investment law for any and all cases. Where it can be shown that States' investment treaty practices purposely and discernibly adopt GATT/WTO treaty language, the unitary system of treaty interpretation would itself require law-appliers to refer to WTO law and jurisprudence.<sup>34</sup> Rather, for purposes of this Article, I invite scrutiny to the deployment of the WTO law *qua* investment law proposition in "public interest" narratives much in vogue now with certain quarters of international investment law scholarship,<sup>35</sup> and which tacitly assume that WTO law contains the veritable and venerable public policy toolbox for solving the "legitimacy crisis"<sup>36</sup> in investment

---

GATT Articles XX/GATS Article XIV and GATT Article XXI), *available at* <http://www.thaifta.com/thaifta/Portals/0/acia.pdf>; Energy Charter Treaty arts. 3 & 4 (explicitly referring to GATT provisions and related instruments), *available at* <http://www.ena.lt/pdfai/Treaty.pdf>; United States/Estonia BIT (1994) art. II (expressly stating that "[t]he free trade area exception in this Treaty is analogous to the exception provided for with respect to trade in the GATT"), *available at* <http://www.state.gov/documents/organization/43560.pdf>; Japan/Cambodia BIT (2007) art. 18 (providing for direct incorporation of GATT and related instruments, e.g. "For the purposes of this Agreement other than Article 13. General Agreement on Tariffs and Trade 1994 arts. XX & XXI; bis of the General Agreement on Trade in Services (GATS) in Annex 1B arts. XIV & XV. The GATS are incorporated into and from part of this Agreement, "mutatis mutandis."); ASEAN-China Investment Agreement, nn.10–11, arts. 16(1) & (2), *available at* [http://www.miti.gov.my/storage/documents/46f/com.tms.cms.document.Document\\_d5b6cac4-c0a81573-5b605b60-f919ea54/1/ACFTA%20Investment%20Agreement%20-%20ASEAN%20Version%20%20\(19%20Nov%202008%20clean\).pdf](http://www.miti.gov.my/storage/documents/46f/com.tms.cms.document.Document_d5b6cac4-c0a81573-5b605b60-f919ea54/1/ACFTA%20Investment%20Agreement%20-%20ASEAN%20Version%20%20(19%20Nov%202008%20clean).pdf)

34. DIANE A. DESIERTO, NECESSITY AND NATIONAL EMERGENCY CLAUSES: SOVEREIGNTY IN MODERN TREATY INTERPRETATION 234 (2012); Lars Markert, *The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States*, in EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW (Special Issue: International Investment Law and EU Law) 145, 169 (Marc Bungenberg et al. eds., 2011); Vienna Convention on the Law of Treaties arts. 31 & 32, *available at* [http://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

35. Collins, *supra* note 3. See also Kevin P. Gallagher, *Policy Space to Prevent and Mitigate Financial Crises in Trade and Investment Agreements*, U.N. G-24 Discussion Paper No. 58 (May 2010), *available at* <http://www.ase.tufts.edu/gdae/Pubs/rp/KGCapControlsG-24.pdf> (last accessed Jan. 10, 2013) (concluding, among others, that investment treaty provisions on capital controls should adopt provisions already found in free trade agreements on balance of payments, essential security exceptions, and a state-to-state dispute resolution process); ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 66–76, 127–66, 179–88 (2012) (referring to proportionality, necessity, and balancing tests in WTO jurisprudence on GATT Article XX exceptions).

36. See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); Erlend M. Leonhardsen, *Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration*, 3 J. INT'L DISPUTE SETTLEMENT 1–42 (2012), *available at* <http://jids.oxfordjournals.org/content/3/1/95.full.pdf+html?sid=000f2776-6a36-4227-b860-fc3be7dd0604>; Christina Cathey Schuetz, *Legitimacy and Inconsistency: Is Investment Arbitration Broken and if so, Can or Should it Be Fixed*, in INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW ch.12 (Ian A. Laird & Todd J. Weiler eds., 2010); Charles N. Brower &

law. Those doubtful of the investment law regime's ability to enable States to continue vindicating and defending public interest would often contrast the alleged paralysis in investment law against the evolution of WTO adjudicative practices toward balancing human rights compliance with foreign market access demands of liberalization and free trade.<sup>37</sup> For some, the public policy dialogue in WTO law might appear more settled, well-reasoned, and coherent in the multilateral and plurilateral trading system, more so than the oft-alluded current quest for "policy space" across constellations of thousands of bilateral and regional investment treaties.<sup>38</sup> At this point in the ongoing public policy and regulatory freedom debate in the international investment law regime, one might be led to believe that trade law's engagement with human rights and public policy has never looked rosier.

This Article suggests there is need to pause and rethink the proposition that WTO law could, and indeed should, be grafted into investment law in order to resolve the latter's current controversies on States' regulatory freedom to vindicate the public interest and human rights. I advance three contextual policy reasons to dial back some of the current enthusiasm, or even over enthusiasm. First, I submit that the public interest and human rights dialectics have evolved and are

---

Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471 (2009).

37. Davies, *supra* note 4; Mitchell & Henckels, *supra* note 27; Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45 (2013); William w. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 333-43 (2010); Benedict Kingsbury & Stephan W. Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – the Concept of Proportionality*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 75-106 (Stephan W. Schill ed., 2010). On emulating the increased participation rights found in regional free trade agreements, see Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 807-18 (2008).

38. See Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law in Comparative Perspective*, 42 TEX. INT'L L.J. 371 (2007); Andrew Newcombe, *General Exceptions in International Investment Agreements*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 355, 366 (Marie-Claire Cordonier Segger et al. eds., 2011).

[G]eneral exceptions are intended to provide greater regulatory flexibility to host States in pursuing the specific legitimate objectives established in the exceptions. Since the inclusion of GATT and GATS-like exceptions in IIAs is quite exceptional, an *effet utile* interpretation might suggest that the parties intended to provide the host State greater regulatory flexibility and a corresponding lower level of investment protection than other IIAs without general exceptions.

*Id.* (indicating an interpretation of general exceptions).

evolving within the WTO and investment treaty regimes according to unique and separate trajectories, to the point that the years of entrenched and embedded treaty texts as well as institutionalized functional decision-making practices in each regime, militate against the automatic transposition of WTO law into investment law. Part II lays-out and synthesizes fundamental differences between treaty language, communities of law-appliers and treaty interpreters, and institutional structures in both WTO law and international investment law, which have heretofore yielded nonlinear interpretations and constructions of the “public interest” and “human rights” norms in both the dispute settlement process and the law-making processes of each treaty regime.<sup>39</sup> As aptly observed by one scholar, the very concept of “public interest” itself remains as “ambiguous” for human rights law as for trade law.<sup>40</sup>

---

39. On human rights and the public interest in WTO law, see among others Viktoriia Kotsiubska, *Public Interest Consideration in Domestic and International Anti-Dumping Disciplines*, unpublished Master's Thesis for the World Trade Institute, Sept. 2011, available at [http://www.wti.org/fileadmin/user\\_upload/wti.org/1\\_master-programme/pdfs/Masters\\_thesis\\_Viktoriia%20Kotsiubska.pdf](http://www.wti.org/fileadmin/user_upload/wti.org/1_master-programme/pdfs/Masters_thesis_Viktoriia%20Kotsiubska.pdf); Ernst-Ulrich Petersmann, *Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution*, in *INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES* 29, 54–56 (Frederick M. Abbott et al. eds., 2006). On the proposed taxonomy of “conditionality-based measures” (e.g., measures taken by one WTO Member State in order to promote or protect the human rights of persons in another WTO Member State through trade restrictions or incentives), “compliance-based measures” (e.g., measures taken by a WTO Member State in order to protect and promote the human rights of persons in its own country, usually distributive rights such as economic, social and cultural rights), and “cooperation-based measures” (e.g., States cooperate in order to protect and promote the human rights of individuals in another State, usually for the protection of distributive rights), see JAMES HARRISON, *THE HUMAN RIGHTS IMPACT OF THE WORLD TRADE ORGANISATION* 175–79 (2007). On human rights and the public interest in international investment law, see among others Susan L. Karamanian, *Human Rights Dimensions of Investment Law*, in *HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS* 236–71 (Erika de Wet & Jure Vidmar eds., 2012); Jorge E. Vinuales & Pierre-Marie Dupuy, *Human Rights and Investment Disciplines: Integration in Progress*, in *INTERNATIONAL INVESTMENT LAW* (M. Bungenberg et al. eds., 2012); Pierre-Marie Dupuy, *Human Rights and International Investment Law: A Case for Fragmentation or Unity of Public International Law?*; Christoph Schreuer & Clara Reiner, *Human Rights and International Investment Arbitration*, in *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 82 (Pierre-Marie Dupuy et al. eds., 2009); Ursula Kriebaum, *Privatizing Human Rights: The Interface Between International Investment Protection and Human Rights*, in *THE LAW OF INTERNATIONAL RELATIONS – LIBER AMICORUM HANSPETER NEUHOLD* 165–89 (August Reinisch & Ursula Kriebaum eds., 2007); Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 *INT'L & COMP. L.Q.* 573 (July 2011), available at <http://journals.cambridge.org/action/displayFulltext?type=1&fid=8351571&jid=ILQ&volumeId=60&issueId=03&aid=8351569&bodyId=&membershipNumber=&societyETOCSession=>; *Aligning Human Rights and Investment Protection*, 10 *TRANSNAT'L DISP. MGMT.* 1 (2013), available at <http://www.transnational-dispute-management.com/article.asp?key=1925>.

40. SIMONE PETER, *PUBLIC INTEREST AND COMMON GOOD IN INTERNATIONAL LAW* 200

Furthermore, the severance of investment law from WTO law in the aftermath of failed negotiations on a multilateral investment regime,<sup>41</sup> I submit, is by no means a historical accident. The competing individual State and non-State interests that resulted in the failure to reach a multilateral investment accord in 1997, have since crystallized into different political and sociological configurations of dispersed public and private sector constituencies, each affecting numerous individual investment treaty negotiations and the eventual contours of the first to third generations of investment treaties.<sup>42</sup> It should be of little surprise then that in the earliest investment treaty generations, public interests through human rights had scarcely any visibility either in treaty language or institutional design.<sup>43</sup>

After the failure of the Doha Development Round<sup>44</sup> and the increasing proliferation of regional free trade agreements,<sup>45</sup> there has been an incremental rise of new investment treaty provisions carving out State regulatory freedom to vindicate public interest and human rights in recent generations of investment treaties (particularly model BITs of the United States and Canada).<sup>46</sup> The current proposal of the

---

(2012).

41. TREBILCOCK & HOWSE, *supra* note 13, at 458–60; Katia Tieleman, *The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network*, unpublished paper for the U.N. Vision Project on Global Public Policy Networks, available at [http://www.gppi.net/fileadmin/gppi/Tieleman\\_MAI\\_GPP\\_Network.pdf](http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf).

42. On alternative visions of the ideological and political histories behind the emergence of the international investment law system, see generally KENNETH J. VANDELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* 19–120 (2010); M. SORNARAJAH, *THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* 18–29 (2d ed. 2004); NEWCOMBE & PARADELL, *supra* note 31, at 1–74; STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* 25–64 (2009); Jose E. Alvarez, *The Once and Future Foreign Investment Regime*, in *LOOKING TO THE FUTURE: ESSAYS IN HONOR OF W. MICHAEL REISMAN*, *supra* note 23, at 607–40.

43. See U.N. CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), *INTERNATIONAL INVESTMENT RULE-MAKING: STOCKTAKING, CHALLENGES AND THE WAY FORWARD* 9–20, 28–32, 41–48, 53–77 (2008), available at [http://unctad.org/en/Docs/iteit20073\\_en.pdf](http://unctad.org/en/Docs/iteit20073_en.pdf).

44. ERNST-ULRICH PETERSMANN, *INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY: CONSTITUTIONAL PLURALISM AND MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS* 419–35 (2012) (detailing the failed negotiations and lack of political support for human rights approaches to the Doha Round Agreements).

45. See U.N. CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), *WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES* at 84–85, 99–103, available at [http://www.unctad.org/en/PublicationsLibrary/wir2012\\_embargoed\\_en.pdf](http://www.unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf) (last accessed Jan. 10, 2013); Susan Ariel Aaronson, *Human Rights*, at 443–66, available at <http://siteresources.worldbank.org/INTRANETTRADE/Resources/C21.pdf> (last accessed Jan. 10, 2013) (surveying and summarizing the human rights provisions that have proliferated in preferential trade agreements of Canada, the European Union, the European Free Trade Association, and the United States).

46. On the negotiation of investment chapters within free trade agreements between Latin American countries and the United States, see Roberto Echandi, *A New Generation of*



U.N. Conference on Trade and Development (UNCTAD), entitled “Investment Policy Framework for Sustainable Development,” puts forward various policy options and recommendations for host States to design various elements in their international investment agreements that would contribute to the achievement of development objectives.<sup>47</sup> Some of these recommendations are drawn from experiences in WTO law and adjudication, and, in my view, require careful analysis of their ultimate applicability to investment law. In an UNCTAD investment policy hub exchange I recently had with Andrew Mitchell and Caroline Henckels on their proposed adoption of “necessity tests” in WTO jurisprudence on GATT Article XX exceptions for investment law, I expressed some reservations primarily due to the lingering contextual and textual differences between WTO law and investment law. WTO Counselor for Legal Affairs Gabrielle Marceau concurred, acknowledging that

[o]ne should be prudent about pursuing this route. The “necessity” provisions under WTO, those in investment treaties, and the necessity principle in general international law in general international law respond to different wordings, objectives, purposes and contexts . . . investment tribunals may gain from the WTO experience in the necessity test, but a mere transposition of the WTO’s approach to the necessity analysis with the view of guiding investment tribunals should take into account the specificity [of] investment treaties concerned.<sup>48</sup>

Understandably, more than a decade of the legal, adjudicative, and policy dialogue on human rights in WTO law and jurisprudence have engineered sufficient practical, as well as theoretical, sedimentation of “trade and human rights” approaches<sup>49</sup>—at least enough to attract

---

*International Investment Agreements in the Americas: Impact of Investor-State Dispute Settlement over Investment Rule-Making*, available at [http://www.cepii.com/anglaisgraph/communications/pdf/2006/20211006/ses\\_3\\_echandi.pdf](http://www.cepii.com/anglaisgraph/communications/pdf/2006/20211006/ses_3_echandi.pdf) (last accessed Jan. 10, 2013).

47. I examine some of the WTO law-based proposals (particularly proportionality analysis for exceptions, and special and differential treatment provisions) in the IPFSD in Part III. See U.N. CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT (2012), available at [http://www.unctad.org/en/PublicationsLibrary/webdiaepcb2012d6\\_en.pdf](http://www.unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf) (last accessed Jan. 10, 2013).

48. See ANDREW D. MITCHELL & CAROLINE HENCKELS, THE CONCEPT OF ‘NECESSITY’ AND NON-PRECLUDED MEASURES IN INTERNATIONAL INVESTMENT LAW: THREE LESSONS FROM WTO TRIBUNALS 8 (2013); Diane A. Desierto Jan. 29, 2013 comment and Gabrielle Marceau Jan. 30, 2013 comment, available at <http://www.investmentpolicyhub.unctad.org/Views/Public/FeaturedDiscussionDetails.aspx?fdid=18> (last accessed Feb. 1, 2013).

49. On the counter-narrative showing how the history of international trade has always contained certain ideas related to the protection and promotion of human rights, albeit reflecting different ideological compromises over time at each stage of political actors’ engagement with

interest in the possibility of transplanting these public policy interpretations and methodologies in WTO law into the supposedly beleaguered international investment law regime. However, one must also deal with a counterpart reality in the investment treaty regime. Years of entrenchment of diverse treaty texts and institutional dynamics in separate “investor-home State-host State” configurations across the globe have also resulted in unique law-making processes and institutional practices, along with an investor-host State dispute settlement mechanism that emerged as a fully distinct enforcement process from that of the inter-State extended litigation process in the WTO Dispute Settlement Understanding (DSU).<sup>50</sup> As I explain further in Part II, disparate treaty texts, functional practices, and institutional structures, pose some substantive and procedural hurdles for law-appliers and authoritative decision-makers to accept *a priori* the WTO law *qua* investment law proposition.

Part III then proceeds to develop my second argument—namely, that while the issue of domestic policy space appears common to both WTO law and investment law (or for that matter, mirrors the perennial tension in the interplay of international law and the *domaine réservé*<sup>51</sup>), they are addressed to different operational questions. WTO interpretations and dialectical conceptions of States’ regulatory freedom have been framed according to the interacting *ratione materiae* of market access issues, non-discrimination issues, standards regulation, and extensive exceptions,<sup>52</sup> and as such are not so analogous or easily transplantable

---

neoliberalism, see ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER* 23–60 (2011).

50. The U.N. High Commissioner for Human Rights has long recognized the unique differences and challenges in achieving human rights protection for different forms of investment. See Report of the High Commissioner for Human Rights, *Economic, Social and Cultural Rights: Human Rights, Trade and Investment*, E/CN.4/Sub.2/2003/9, July 2, 2003, ¶¶ 7–12.

51. See Joseph H.H. Weiler, *The Geology of International Law – Governance, Democracy, and Legitimacy*, ZaöRV 64, 547–62 (2004), available at [http://www.zaoerv.de/64\\_2004/64\\_2004\\_3\\_a\\_547\\_562.pdf](http://www.zaoerv.de/64_2004/64_2004_3_a_547_562.pdf) (last accessed Jan. 10, 2013); Galina G. Shinkaretskaya, *Content and Limits of ‘Domaine Réservé,’* in INTERNATIONAL LAW AND MUNICIPAL LAW 123–42 (Grigori Ivanovich Tunkin & Rüdiger Wolfrum eds., Duncker & Humblot 1988); JEAN L. COHEN, *GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM* 165–222 (2012).

52. Erich Vranes, *The WTO and Regulatory Freedom: WTO Disciplines on Market Access, Non-Discrimination and Domestic Regulation Relating to Trade in Goods and Services*, 12 J. INT’L ECON. L. 4, 953–87 (2009); Jörg Mayer, *Policy Space: What, for What, and Where?*, 27 DEV. POL’Y REV. 4, 373–95 (2009); Henning Grosse Ruse-Khan, *A Comparative Analysis of Policy Space in WTO Law* (Max Planck Inst. for Intellectual Prop., Competition & Tax Law Research Paper Series, No. 08-02, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1309526](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1309526) (last accessed Jan. 10, 2013); Christine Breining-Kaufmann, *The Legal Matrix of Human Rights and Trade Law: State Obligations Versus Private Rights and Obligations*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 95–136 (Thomas Cottier et al. eds.,

to issues of regulatory freedom that States confront in international investment law, particularly in matters of expropriation, legitimate expectations in the fair and equitable treatment standard, national treatment, and non-precluded measures.<sup>53</sup>

Moreover, one can expect that the respective institutional understandings of State regulatory freedom within WTO law and investment law would accordingly cycle back to future treaty-drafting and rule-making processes in each treaty regime. State regulatory freedom in WTO law, for example, is not simply a matter of interpretation for the DSU Panels and the Appellate Body,<sup>54</sup> but rather, is also manifested as a continuing legislative issue to be politically mediated and coordinated between States, non-State actors, and the WTO in processes such as the Trade Policy Review Mechanism,<sup>55</sup> the negotiation of special and differential treatment (SDT) rules in various trade agreements,<sup>56</sup> the authentic interpretations of the General Council and the Ministerial Conference,<sup>57</sup> the use of the waiver power in the WTO,<sup>58</sup> among other internal procedures and functions. By contrast, international investment law remains devoid of any centralized mechanism for States to periodically and transparently review, renegotiate, or authentically interpret investment treaty provisions that involve the issue of States' regulatory freedom to vindicate the public

---

2005).

53. Spears, *supra* note 32; Jürgen Kurtz, *Balancing Investor Protection and Regulatory Freedom in Investor-State Arbitration: The Complex Search for State Purpose in a National Treatment Inquiry*, Jan. 19, 2012 unpublished draft, available at <http://www.iilj.org/research/documents/KurtzBalancingInvestorProtectionandRegulatoryFreedomPaper.pdf> (last accessed Jan. 10, 2013); U.N. CONFERENCE ON TRADE AND DEVELOPMENT, EXPROPRIATION (UNCTAD Series on Issues in International Investment Agreements II, 2012), available at [http://www.unctad.org/en/docs/unctaddiaeia2011d7\\_en.pdf](http://www.unctad.org/en/docs/unctaddiaeia2011d7_en.pdf) (last accessed Jan. 10, 2013); Howard Mann, *The Right of States to Regulate and International Investment Law*, Nov. 2002 unpublished paper, available at [http://www.iisd.org/pdf/2003/investment\\_right\\_to\\_regulate.pdf](http://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf) (last accessed Jan. 10, 2013); U.N. CONFERENCE ON TRADE AND DEVELOPMENT, THE PROTECTION OF NATIONAL SECURITY IN IIAS (UNCTAD Series on International Investment Policies for Development 2009), available at [http://www.unctad.org/en/docs/diaeia20085\\_en.pdf](http://www.unctad.org/en/docs/diaeia20085_en.pdf) (last accessed Jan. 10, 2013).

54. See Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 LAIRD EUR. J. INT'L L. 4, 753–814 (2002).

55. See SAM LAIRD & RAYMUNDO VALDES, *The Trade Policy Review Mechanism*, in THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION (2012); ANTHONY E. CASSIMATIS, HUMAN RIGHTS RELATED TRADE MEASURES UNDER INTERNATIONAL LAW 141 (2007).

56. Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment* (Oct. 2004) (unpublished paper), available at <http://wwwdfidgov.uk/pubs/files/itd/operationalizing-sdt.pdf> (last accessed Jan. 10, 2013).

57. See Barnali Choudhury et al., *A Call for a WTO Ministerial Decision on Trade and Human Rights*, in HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 52, at 323–58, 343.

58. See Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests*, 20 EUR. J. INT'L L. 3 (2009).

interest and human rights.<sup>59</sup>

The immediate consequence of the interpretive/legislative gap is that the concept of State regulatory freedom in WTO law might not have as much traction or utility to the design of States' regulatory freedom in international investment law. As I also show briefly in Part III, they generate some interpretive complications already for a few new investment treaties that expressly adopt GATT Article XX or GATS Article XIV. It is more than likely that parallel, rather than identical visions of State regulatory freedom are emerging in both treaty regimes. Thus, while WTO law might present a convenient template for investment treaty language, one has to carefully assess whether the former's treaty design assumptions and drafting history would indeed apply, and truly benefit, the latter.

Thirdly, I submit in Part IV that WTO law and jurisprudence itself does not possess an unvarnished record in successfully vindicating the public interest through human rights.<sup>60</sup> Despite some well-known victories (such as the TRIPS waiver on compulsory licensing to make essential drugs available to developing countries,<sup>61</sup> and the Kimberley Process Certification waiver to prevent the further proliferation of

59. Note, however, some recent investment treaties have started providing for joint decision mechanisms, a standing treaty monitoring and/or interpretative inter-State body, or consultation mechanisms. Diane Desierto, *Joint Decisions by States Parties: Fair Control of Tribunal Interpretations?*, KLUWER ARBITRATION BLOG (June 8, 2012), <http://kluwerarbitrationblog.com/blog/2012/06/08/joint-decisions-by-state-parties-fair-control-of-tribunal-interpretations/> (on inter-State joint decision and consultation mechanisms within investment treaties). See also NEWCOMBE & PARADELL, *supra* note 32, at 61 (on renegotiation and new model international investment agreements); Meg Kinnear & Robin Hansen, *The Influence of NAFTA Chapter 11 in the BIT Landscape*, 12 U.C. DAVIS J. INT'L L. & POL'Y 101, 112 (2005) (on procedural mechanisms from NAFTA such as binding notes of interpretation).

60. For some skeptical findings showing human rights failures under the WTO system, see Sandrine Dawar, *Trade and Human Rights: Exploring the Impact of WTO Law on State Capacity to Protect, Promote and Fulfill the Human Right to Health* (May 2004) (unpublished Master of Arts in Law and Diplomacy Thesis for Fletcher School of Diplomacy, Tufts University) (on file with author); Allison Carnegie, *Instruments of Coercion: Aid and Trade as Substitute Policy Levers* (Nov. 7, 2012) (unpublished paper), available at [http://nccg.princeton.edu/IPES/2012/papers/S400\\_rm1.pdf](http://nccg.princeton.edu/IPES/2012/papers/S400_rm1.pdf) (last accessed Jan. 10, 2013) (demonstrating that states punish illiberal policies of fellow WTO member states by decreasing aid allocations, rather than by increasing trade protection); Susan Ariel Aaronson & M. Rodwan Abouharb, *Does the WTO Help Member States Clean Up?* (Aug. 2011) (unpublished paper) (on file with the Institute for International Economic Policy, George Washington University), available at [http://www.gwu.edu/~iiep/assets/docs/papers/Aaronson\\_IIEPWP2011-13.pdf](http://www.gwu.edu/~iiep/assets/docs/papers/Aaronson_IIEPWP2011-13.pdf) (last accessed Jan. 10, 2013) (finding that "empirical analysis did not show that GATT/WTO accession or membership over time improves governance outcomes . . . new members of the WTO did not improve their performance on our measures of due process, access to information and even-handedness during the accession process or as members.").

61. See Decision of General Council, *TRIPS Waiver for the Exportation of Essential Drugs Under Compulsory Licensing*, WT/MIN(01)DEC/2 (Aug. 30, 2003).

conflict diamonds<sup>62</sup>), full acceptance of States' regulatory freedom to enact policies that vindicate public interest or human rights concerns remains very much a work-in-progress throughout the WTO system.<sup>63</sup> Human rights obligations are, to date, still thinly incorporated in the WTO commitments.<sup>64</sup> Interpretations of trade law exceptions in WTO jurisprudence still struggle for full consistency with human rights.<sup>65</sup> Clearly, the jury is still out on whether WTO law has indeed succeeded in facilitating human rights compliance in a post-Doha era.<sup>66</sup> This casts some doubts for inducing investment law authoritative decision-makers to follow where WTO law has not even clearly or certainly succeeded.

Pending the full convergence of treaty language and epistemic interpretive communities between WTO law and investment law, I submit that questions of public policy and human rights will continue to filter through different channels, albeit with some occasional normative and experiential resemblances that could inform future treaty and institutional design developments in each regime. In Part V, I explore how each treaty regime would likely regard and accommodate State defenses anchored on competing obligations under the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and why this next dialogue will take place on different terms within each regime.

By way of Conclusion, I offer some further reflections on the broader theme of systemic integration and the chimera of attaining a

62. See Decision of the General Council of May 15, 2003, *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds*, WT/L/518 (May 27, 2003).

63. On the other hand, for promising findings on achieving human rights compliance under the international trading system, see Drusilla K. Brown et al., *Labor Standards and Human Rights: Implications for International Trade and Investment* (Univ. of Michigan, IPC Working Paper Series No. 119, 2011), available at <http://ipc.umich.edu/working-papers/pdfs/ipc-119-brown-deardorff-stern-labor-standards-human-rights-international-trade-investment.pdf> (last accessed Jan. 10, 2013); HAKAN NORDSTROM & SCOTT VAUGHAN, *TRADE AND ENVIRONMENT* (1999); Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593, 593–629 (2005); Michael J. Trebilcock, *Critiquing the Critics of Economic Globalization*, 1 J. INT'L L. & INT'L RELATIONS 213–38 (2005).

64. See HOLGER P. HESTERMEYER, *HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES* (2007); Joost Pauwelyn, *Human Rights in WTO Dispute Settlement*, in *HUMAN RIGHTS AND INTERNATIONAL TRADE*, *supra* 52, at 205–31.

65. Report of the Panel, *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT Doc. DS10/R (Nov. 7, 1990); Report of the Panel, *United States – Restrictions on Imports of Tuna*, GATT Doc. DS21/R (Sept. 3, 1991); Report of the Panel, *United States – Restrictions on Imports of Tuna*, GATT Doc. DS29/R (June 16, 1994); Report of the Panel, *United States – Taxes on Automobiles*, GATT Doc. DS31/R (Oct. 11, 1994).

66. On the imminent failures of abandoning the Doha Round, see Petros C. Mavroidis, *Doha, Dohalf or Dohaha? The WTO Licks Its Wounds*, 3 DAVIS TRADE L. & DEV. 367, 367–81 (2011).

fully “closed system” for governing different forms of international economic relations. Fragmentation becomes a “problem” only as a matter of perspective—one wrestles with it only if we persist in regarding international law through a kind of “gestalt,” always preferring to see an elegant and integral whole much greater than the sum of its parts. The realities of political deadlocks, institutional rigidities, and international negotiations that define the processes of authoritative decision-making in our modern international economic law, policies, and institutions, however, impel us to reject such a utopian view.

## II. TEXTS, APPLIERS AND STRUCTURE: NONLINEAR INTERPRETATION OF THE “PUBLIC INTEREST” AND HUMAN RIGHTS

As will be seen in the following subsections, the legal universes in WTO law and international investment law are fundamentally comprised of different bases of obligation, authoritative decision-makers, and constitutive decision-making processes. The following subsections show how plural understandings of the “public interest” and human rights abound in each of those different constitutive elements.

### *A. Hard and Soft Texts: Bases of Obligation in WTO Law Vis-à-vis International Investment Law*

#### 1. WTO Law

As the WTO itself states, its core rules are contained in around sixty agreements, annexes, decisions, and understandings, mostly concluded during the 1986-1994 Uruguay Round, spanning the Marrakesh Agreement Establishing the WTO, and agreements in trade in goods, trade in services, intellectual property, dispute settlement, and government trade policy review.<sup>67</sup> The WTO categorizes these agreements into three: (1) “broad principles” (e.g., the General Agreement on Tariffs and Trade, the General Agreement on Trade in Services, and the Agreement on Trade-Related Aspects of Intellectual Property Rights); (2) “extra agreements and annexes dealing with the special requirements of specific sectors or issues”; and (3) “detailed and lengthy schedules (or lists) of commitments made by individual countries allowing specific foreign products or service providers access to their markets.”<sup>68</sup> While it is usually observed that individual rights

---

67. See Navigational Guide to the WTO Agreements, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm) (last visited Jan. 10, 2013).

68. *Id.*

are nowhere found in most of the WTO agreements,<sup>69</sup> Steve Charnovitz famously showed that “individuals secure rights indirectly from the WTO,”<sup>70</sup> (e.g., from individual property rights guaranteed in the TRIPS agreement, rights to standard of treatment under the MFN and national treatment clauses, to transparency and due process rights and remedial procedures that could be asserted by individuals against their own governments), as well as certain direct procedural rights (e.g., rights under the grievance procedure for exporters under the Agreement on Preshipment Inspection).<sup>71</sup> Apart from the WTO agreements, other sources of WTO law (alternatively dubbed as soft law<sup>72</sup> in the WTO) that may “clarify or define the law applicable between WTO Members”<sup>73</sup> include: the WTO dispute settlement reports, the acts of WTO bodies, agreements concluded in the context of the WTO, customary international law, general principles of law, other international agreements, subsequent practice of WTO Members, teachings of the most highly qualified publicists, and the negotiating history.<sup>74</sup>

The WTO Agreements usually do not explicitly contain any references to international human rights law. At best, the general exceptions clauses in GATT Article XX and GATS Article XIV justify States to adopt trade-restrictive measures necessary for protecting various public interest concerns, such as the protection of public morals; human, animal or plant life or health; ensuring compliance with domestic laws and regulations on fraud, deceits, data protection, and

---

69. Breining-Kaufmann, *supra* note 52, at 102.

70. Steve Charnovitz, *The WTO and the Rights of the Individual*, 36 INTERECONOMICS 98 (2001).

71. *Id.*

72. Mary Footer identifies soft law instruments in the WTO as

the resolutions adopted by the organisation's institutional bodies. These include not only ministerial declarations and decisions but also the decisions of the various councils and committees, which may embody understandings, guidelines, notes produced by the WTO Secretariat at the request of the members, Chairman's statements and so on. While they are not intended to be legally binding they may nevertheless have practical effect and may prove legally relevant . . . [soft law in the WTO] has proven to be particularly useful where there is broad lack of agreement or a lack of coordination among WTO members, where an issue is highly contestable or where cooperation gives rise to distributive conflicts.

See Mary E. Footer, *The (Re)turn to 'Soft Law' in Reconciling the Antinomies in WTO Law*, 11 MELB. J. INT'L. L. 241, 247–48 (2010).

73. PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 53 (2d ed. 2008).

74. *Id.* See also JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW*, 40–52 (2003).

safety; labor; cultural heritage; and national resource conservation.<sup>75</sup> There is now a substantial body of jurisprudence authoritatively interpreting these provisions, following a two-tier test adopted by the WTO dispute settlement panels and the Appellate Body: a challenged trade-restrictive measure must first be provisionally evaluated or justified according to any of the specific enumerated exceptions (e.g., ten exceptions in GATT Article XX (a) to (j), or five exceptions in GATS Article XIV (a) to (e)). If this first tier test is met, then the second tier of analysis requires examining the measure's compliance with the provision's chapeau.<sup>76</sup> The chapeau imposes the requirement that the challenged measure should not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."<sup>77</sup> The chapeau has been progressively linked to the principle of good faith in international law.<sup>78</sup>

---

75. See Thomas Cottier et al., art. XIV GATS: *General Exceptions*, in MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, WTO – TRADE IN SERVICES, vol. 6, at 287 (Rüdiger Wolfrum et al. eds., 2008); TREBILCOCK & HOWSE, *supra* note 13, at 507–87; CASSIMATIS, *supra* note 55, at 334.

76. RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENTS ON TARIFFS AND TRADE 531–33 (2005); VAN DEN BOSSCHE, *supra* note 73, at 620, 653; Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, at 22, WT/DS2/AB/R, (Apr. 29, 1996).

77. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187 art. XX (1999); General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183 art. XIV (1999); see Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 150, WT/DS58/AB/R (Oct. 12, 1998).

78. *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body, 12 Oct. 1998, ¶ 158. See also *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, Report of the Appellate Body, Dec. 3, 2007, ¶ 224.

[T]he function of the chapeau is the prevention of abuse of the exceptions specified in the paragraphs of Article XX . . . the task of interpreting and applying the chapeau is the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g. art. XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.

*Id.* (The location of this line of equilibrium may move “as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.”); *China – Measures Affecting Trading Rights and Distribution Services for Certain Products and Audiovisual Entertainment Products*, WT/DS363/AB/R, Report of the Appellate Body, Dec. 21, 2009, ¶ 306 (clarifying that the chapeau element of “disguised restriction on international trade” must



Notwithstanding the established nature of the two-tiered test for general exceptions, it cannot be lightly assumed that the Appellate Body (and/or the dispute settlement panels in the WTO) has consistently applied the test uniformly and consistently in actual disputes brought before them. The “public morals” exception under GATT Article XX(a) and GATS Article XIV(a) presents a classic example of how the Appellate Body can purposely choose to develop or flesh out its pre-existing interpretations or methodologies.

In *China—Publications and Audiovisual Products*,<sup>79</sup> the WTO Appellate Body affirmed that—similar to other jurisprudence on GATT Article XX and GATS Article XIV<sup>80</sup>—the method of interpreting the “public morals” exception under GATT Article XX(a) would be through “a sequential process of weighing and balancing factors involved.”<sup>81</sup> The 2009 Appellate Body ruling in *China—Publications and Audiovisual Products* was the first case to interpret the “public morals” exception under GATT Article XX(a). Before then, the only comparable interpretation of the “public morals” exception was that issued by the Appellate Body in 2005, in relation to GATS Article XIV(a) in *United States—Gambling Services*.<sup>82</sup>

---

be applied in the light of the specific obligation of the covered agreements that the respective measure infringes. The assessment of the restrictive effect to be taken into account in a particular dispute may, in appropriate cases, extend beyond an assessment of the restrictive effect on imported products, as this assessment must be undertaken in the light of the measure at issue, the specific obligation of the covered agreements that the measure infringes, and the defence being invoked.

*United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 158; see also Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 224, WT/DS332/AB/R (Dec. 3, 2007); Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Products and Audiovisual Entertainment Products*, ¶ 306, WT/DS363/AB/R (Dec. 21, 2009).

79. See generally Appellate Body Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009).

80. *Id.* ¶ 239 (citing *Korea – Various Measures on Beef* in the context of Article XX(d) of the GATT 1994); see Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) (in the context of Article XIV(a) of the GATS); see *Brazil – Retreaded Tyres* (in the context of Article XX(b) of the GATT 1994).

81. *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 239–42.

82. *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, Report of the Appellate Body, Apr. 7, 2005, ¶¶ 306–11:

306. The process begins with an assessment of the “relative importance” of the interests or values furthered by the challenged measure. Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that are to be “weighed and balanced.” The Appellate Body has pointed to two factors that, in most cases, will be relevant to a panel’s determination of the “necessity” of a measure, although not necessarily exhaustive of factors that might be considered. One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce.

307. A comparison between the challenged measure and possible alternatives should then be undertaken, and the results of such comparison should be considered in the light of the importance of the interests at issue. It is on the basis of this “weighing and balancing” and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is “necessary” or, alternatively, whether another, WTO-consistent measure is “reasonably available.”

308. The requirement, under Article XIV(a), that a measure be “necessary”—that is, that there be no “reasonably available,” WTO-consistent alternative—reflects the shared understanding of Members that substantive GATS obligations should not be deviated from lightly. An alternative measure may be found not to be “reasonably available,” however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a “reasonably available” alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV.

309. It is well-established that a responding party invoking an affirmative defence bears the burden of demonstrating that its measure, found to be WTO-inconsistent, satisfies the requirements of the invoked defence. In the context of Article XIV(a), this means that the responding party must show that its measure is “necessary” to achieve objectives relating to public morals or public order. In our view, however, it is not the responding party’s burden to show, in the first instance, that there are *no* reasonably available alternatives to achieve its objectives. In particular, a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. The WTO agreements do not contemplate such an impracticable and, indeed, often impossible burden.

310. Rather, it is for a responding party to make a *prima facie* case that its measure is “necessary” by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be “weighed and balanced” in a given case. The responding party may, in so doing, point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is “necessary.” If the panel concludes that the respondent has made a *prima facie* case that the

In *China—Publications and Audiovisual Products*, China had invoked GATT Article XX(a) to justify a range of measures that regulated the entry of foreign publications, audiovisuals and other media forms, under a content review mechanism and system for the selection of import entities, in order to protect public morals in China.<sup>83</sup> China had essentially argued that the public policy function behind the regulations (particularly the cultural nuances of Chinese public morals), made it inevitable that content review for such media could only be conducted by State-owned entities.<sup>84</sup> In its analysis of the public morals defense under GATT Article XX(a), the Appellate Body declared the following:

(1) “China did not establish a connection between the exclusive ownership of the State in the equity of an import entity and that entity’s contribution to public morals in China.”<sup>85</sup> The same reasoning was likewise extended to the prohibition against foreign-invested enterprises from engaging in importing;<sup>86</sup>

(2) China had not met its burden of proof to show that a certain (unsubstantiated) State plan that would supposedly indicate the total number, structure, and distribution of publication import entities, would indeed contribute to the protection of public morals in China by feasibly enabling content review;<sup>87</sup>

---

challenged measure is “necessary”—that is, “significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to’”—then a panel should find that challenged measure “necessary” within the terms of Article XIV(a) of the GATS.

311. If, however, the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains “necessary” in the light of that alternative or, in other words, why the proposed alternative is not, in fact, “reasonably available.” If a responding party demonstrates that the alternative is not “reasonably available,” in the light of the interests or values being pursued and the party’s desired level of protection, it follows that the challenged measure must be “necessary” within the terms of Article XIV(a) of the GATS.

*United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 306–11.

83. Panel Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 7.712, WT/DS363/R (Aug. 12, 2009).

84. Appellate Body Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 255–68.

85. *Id.* ¶ 268.

86. *Id.* ¶¶ 276–77.

87. *Id.* ¶¶ 294–97.

(3) The “less restrictive means” element as part of the sequential weighing and balancing test of “necessity” in GATT Article XX(a), for this particular case,

must be applied in the light of the specific obligation of the covered agreements that the respective measures infringes . . . [and that] the assessment of the restrictive effect to be taken into account in a particular case, may, in appropriate cases, *extend beyond an assessment of the restrictive effect on imported products*, as this assessment must be undertaken in the light of the measure at issue, the specific obligation of the covered agreements that the measure infringes, and the defence being invoked,<sup>88</sup>

and thus, who could engage in such trading was part of determining the least restrictive means.<sup>89</sup> The Panel had rightly identified a less restrictive means than the State-ownership requirement and the import prohibition on foreign-invested entities (e.g., the State plan previously mentioned, had China sufficiently presented evidence to develop the actual contours of this alternative);<sup>90</sup> and

(4) China had failed to show that there were no other reasonably available means before it, such as for the Chinese government to itself uniformly conduct the content review. China had failed to show that this reasonably available means would cause such an “undue burden” (e.g., financial, administrative burden, technical difficulties) upon it given the evidence submitted.<sup>91</sup>

Two matters stand out in *China—Publications and Audiovisual Products* from the interpretive practices of the Appellate Body, that did not feature in the Body’s interpretation of the identically-worded “public morals exception” in GATS Article XIV(a) in *United States—Gambling Services*. First, the Appellate Body in *China—Publications and Audiovisual Products* acknowledged that, while GATT Article XX(a) did not provide any explicit guidance “on the question of whether, in assessing ‘necessity,’ a panel may take into account only the restrictive effect the measures have on imports of relevant products, or whether a panel may also consider the restrictive effect of the measures

---

88. *Id.* ¶ 306 (emphasis added).

89. *Id.* ¶ 308.

90. *Id.* ¶ 310.

91. *Id.* ¶¶ 327–32; 335.

on importers or potential importers,”<sup>92</sup> there may be cases where it would be appropriate to further differentiate restrictive impacts on international commerce. In *China—Publications and Audiovisual Products* the Panel had applied the “less restrictive means” test in the sequential weighing and balancing test of necessity for GATT Article XX(a) to consider two types of restrictive impact—first, a restrictive impact on the actual importation of the subject goods, and second, the restrictive impact of the measures on the right to trade of those who wish to engage in such importation in the future.<sup>93</sup> This was a nuance not found in *United States—Gambling Services*, where the Appellate Body simply identified, and did not elaborate on, two factors

that, in most cases, will be relevant to a panel’s determination of the “necessity” of a measure, although not necessarily exhaustive of factors that might be considered. One factor is the contribution of the measure to the realization of the ends pursued by it; *the other factor is the restrictive impact of the measure on international commerce.*<sup>94</sup>

The Appellate Body in *China—Publications and Audiovisual Products* deemed it valid to consider both the restrictive impact on imports as well as the rights to trade of enterprises, due to the particular content of China’s obligations to grant the right to trade under its Accession Protocol to the WTO.<sup>95</sup>

Second, the Appellate Body in *China—Publications and Audiovisual Products* appeared somewhat unclear as to how it allocated the evidentiary burdens with respect to other “reasonably available means” or alternatives. It may be recalled that in *United States—Gambling Services*, the Appellate Body clearly stated that it was *not* the burden of the responding party to show that there were *no* reasonably available alternatives whatsoever.<sup>96</sup> Rather, it is only when the complaining party “raises a WTO-consistent alternative measure that, in its view, the responding party should have taken,” that the “the responding party will [then] be required to demonstrate why its challenged measure nevertheless remains ‘necessary’ in the light of that alternative or, in other words, why the proposed alternative is not, in fact, ‘reasonably

---

92. *Id.* ¶ 303.

93. *Id.* ¶ 300.

94. *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 306 (emphasis added).

95. *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 307.

96. *Id.* ¶ 319.

available.”<sup>97</sup>

Among its proposals for other “reasonably available alternatives” in *China—Publications and Audiovisual Products*, the United States proposed that the Chinese Government assume sole responsibility for conducting content review.<sup>98</sup> While the Panel found this proposal to be a reasonably available alternative, it is not entirely clear from the Panel’s discussion that the burden of proof had at least been placed first on the United States to prove the feasibility of its proposal. In several instances it almost seems as if the Panel indulged in unverified assumptions about the efficiency and quality of China’s administrative, institutional, and bureaucratic capabilities, as well as the supposed sufficiency of its domestic laws,<sup>99</sup> and that what proved decisive for the Panel was that China had failed to present sufficient evidence *in extenso* of the infeasibility or unreasonableness of the proposal.<sup>100</sup> The United States had mainly argued that the Panel already had ample evidence before it that China was capable of conducting some form of content review, such as those China was already conducting for films imported for theatrical release, electronic publications, and audiovisual products.<sup>101</sup> The Appellate Body endorsed the method taken by the Panel as the “appropriate” one for determining whether reasonably available means existed, but appeared quite silent on the quantum (and specificity) of proof that it ultimately required the United States to establish as the complaining party making the proposal, *vis-à-vis* China, as the responding party who supposedly was not obligated to furnish proof until the complaining party had been able to establish a WTO-consistent measure was a reasonably available alternative.<sup>102</sup> At a minimum, these differences in *China—Publications and Audiovisual Products* and *United States—Gambling Services* provides some telling insight as to the scope and breadth of the Appellate Body’s discretion over the methodology it would adopt to interpret the “public morals” exception in GATT Article XX(a) and its identical counterpart, GATS Article XIV(a).

Beyond the development of legal tests of “necessity” in relation to the public morals exception in GATT Article XX(a), however, it is also

97. *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 311.

98. *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 312.

99. Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 7.888–7.891, WT/DS363/R (Aug. 12, 2009).

100. *Id.* ¶¶ 7.888–7.893.

101. *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 323.

102. *Id.* ¶¶ 327–32.

significant that there was hardly any discussion in *China—Publications and Audiovisual Products* on the State's regulatory freedom in relation to GATT Article XX(a). Rather, the Appellate Body dealt with the right to regulate in the context of interpreting the introductory paragraph 5.1 in China's Accession Protocol to the WTO (e.g., "Without prejudice to China's *right to regulate* trade in a manner consistent with the WTO Agreement").<sup>103</sup> The Appellate Body held in *China—Publications and Audiovisual Products* that the Panel erred in omitting to resolve the issue of whether GATT Article XX applies to other agreements apart from the GATT such as paragraph 5.1 of China's Accession Protocol to the WTO, and determined to resolve the issue itself.<sup>104</sup> The Appellate Body then interpreted the phrase "right to regulate trade in a manner consistent with the WTO Agreement" to refer to two types of rights: (1) "rights that the covered agreements affirmatively recognize as accruing to WTO members, namely, the power of Members to take specific types of regulatory measures in respect of trade in goods when those measures satisfy prescribed WTO disciplines and meet specified criteria" (e.g., WTO-consistent import licensing, SPS and TBT measures); and (2) "certain rights to take regulatory action that derogates from obligations under the WTO Agreement – that is, to relevant exceptions."<sup>105</sup> The Appellate Body ultimately interpreted China's right to regulate as that which is "protected under the introductory clause of paragraph 5.1. *only if it is consistent with the WTO Agreement.*"<sup>106</sup>

This interpretation of the right to regulate would spur another attempt to export GATT Article XX to agreements not covered by GATT. In *China—Raw Materials*,<sup>107</sup> China unsuccessfully attempted to invoke GATT Article XX as a defense to its export duties found inconsistent with paragraph 11.3 of its Accession Protocol,<sup>108</sup> contending that its right to regulate trade to promote conservation and health is an individual "inherent right" not dependent on the terms of its Accession Protocol.<sup>109</sup> While the Appellate Body acknowledged that the Preamble to the WTO Agreement lists various objectives, "including 'raising standards of living,' 'seeking both to protect and preserve the environment,' and 'expanding the production of and trade in goods and services, while allowing trade in goods and services, while allowing for

---

103. *Id.* ¶ 205.

104. *Id.* ¶ 215.

105. *Id.* ¶ 223.

106. *Id.* ¶ 230 (emphasis added).

107. See generally Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 30, 2012).

108. *Accession of the People's Republic of China*, WT/L/432, Nov. 23, 2001.

109. *China – Measures Related to the Exportation of Various Raw Materials*, ¶ 300.

the optimal use of the world's resources in accordance with the objectives of sustainable development,” such that the WTO Agreement “reflect(s) the balance struck by WTO Members between trade and non-trade-related concerns,”<sup>110</sup> the Appellate Body nevertheless declined to find that the Preamble to the WTO Agreement provided any guidance on the issue of the applicability of GATT Article XX to other agreements not covered. The Appellate Body thus delimited the possible scope of using GATT Article XX as public policy and public interest defenses, since, following this 2012 ruling in *China—Raw Materials*, GATT Article XX exceptions would not apply as legal bases for States to invoke their rights to regulate and spaces of regulatory freedom under non-GATT agreements.<sup>111</sup>

There are a myriad of other examples from the Appellate Body's jurisprudence, which demonstrate the breadth of its methodological and evidentiary discretion when it comes to developing legal and evidentiary tests for the application of health exceptions under GATT Article XX(b),<sup>112</sup> domestic policy exceptions under GATT Article XX(d),<sup>113</sup> and environmental conservation exceptions under GATT Article XX(g).<sup>114</sup> Neither may it be said that the jurisprudence of the

110. *Id.* ¶ 306.

111. See Danielle Spiegel Feld & Stephanie Switzer, *Whither Article XX? Regulatory Autonomy under Non-GATT Agreements after China – Raw Materials*, 38 YALE J. INT'L L. ONLINE 17–30 (2012), available at <http://www.yjil.org/docs/pub/o-38-feld-switzer-whither-article-xx.pdf> (last accessed Feb. 1, 2013).

112. See among others Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, ¶ 161, WT/DS135/AB/R (Mar. 12, 2001). Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, ¶¶ 7.479–7.480, WT/DS394/R, WT/DS395/R, WT/DS398/R (July 5, 2011). Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 7.98, WT/DS332/R (June 12, 2007). Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, ¶¶ 7.67–7.69, WT/DS392/R (Sept. 29, 2010). Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶¶ 7.306–7.309, WT/DS406/R (Sept. 2, 2011). Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 75 DS10/R – 37S/200 (Nov. 7, 1990). Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 7.209–7.210, WT/DS246/R (Dec. 1, 2003). Panel Report, *United States – Restrictions on Imports of Tuna*, ¶¶ 5.26–5.27, DS21/R-39S/155 (Sept. 3, 1991).

113. See among others Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, ¶¶ 157, 161, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000). Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, ¶ 69, WT/DS308/AB/R (Mar. 6, 2006). Panel Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, ¶ 6.13, WT/DS345/R (Feb. 29, 2008). Panel Report, *Japan – Restrictions on Imports of Certain Agricultural Products*, ¶ 5.2.2.3. L/6253-35S/163 (Feb. 2, 1988).

114. *China – Measures Related to the Exportation of Various Raw Materials*, ¶¶ 355–56. *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 128–29. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*,



WTO Appellate Body and the dispute settlement panels demonstrate full unanimity in their conceptions of “public interest” in the GATT Article XX or GATS Article XIV exceptions, the spaces of regulatory freedom acceptable under each exception, as well as in their methods for determining the “necessity” of a State’s trade-restrictive measure in relation to the asserted “public interest” objective.<sup>115</sup> Rather, what stands clearly from both the WTO legal texts themselves, as well as the “soft” sources of WTO law (as seen in the Appellate Body decisions and reports of dispute settlement Panels), is that they are pliable on the question of States’ trade-restrictive measures taken in the exercise of regulatory freedom to vindicate the public interest. This question was purposely anticipated in the drafting of GATT Article XX and GATS Article XIV exceptions.<sup>116</sup> Arguably, the issue of a State’s regulatory freedom to vindicate the public interest, which could also result in non-conformity with trade liberalization obligations, was part of the shaping of WTO law since its inception.

Thus, even without direct incorporation of international human rights instruments, WTO law possesses an inherent suppleness to accommodate and reconcile a State’s right to regulate for human rights.<sup>117</sup> It is also acknowledged to have greater structural and institutional potential than bilateral and regional trade agreements to achieve the aims of human rights protection.<sup>118</sup> From this standpoint, it

---

at 18, WT/DS2/AB/R (Apr. 29, 1996).

115. See Tenu Avafia, *Does the WTO’s Dispute Settlement Understanding Promote Sustainable Development*, in *SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW* 259–71 (Markus W. Gehring & Marie-Claire Cordonier Segger eds., 2005).

116. See STEFAN ZLEPTNIG, *NON-ECONOMIC OBJECTIVES IN WTO LAW: JUSTIFICATION PROVISIONS OF GATT, GATS, SPS AND TBT AGREEMENTS*, ch. 4 (2010); DESIERTO, *supra* note 34, ch. 5.

117. Marceau, *supra* note 14, at 779–88.

118. HARRISON, *supra* note 14, at 180–81.

[A]lthough there are almost 300 bilateral and regional trade agreements which contain some kind of explicit human rights clause, this does not mean that the clauses within those agreements ensure a holistic human rights approach to the agreements in question, based on acceptable international norms and standards. There is a big difference between a trade agreement that contains a human rights clause, and agreements that systematically ensures the protection and promotion of human rights in all aspects of the obligations created by those agreements . . . A world trading system helps to ensure that trading rules are not decided by power politics or ‘aggressive unilateralism’. Rules help to bind all governments, including the most powerful, to act according to established and agreed principles and regulations. Adherence to such a rule-based system is generally beneficial from a human rights perspective, as it benefits smaller and more vulnerable States (whose populations human rights are most likely to be violated) as opposed to power-based diplomacy where more powerful States dominate.

is conceivable that the interaction between WTO law and human rights law has been described as one anchored on “coordination,” rather than conflict, tending towards the “accommodation of human rights interests by the WTO.”<sup>119</sup> Most importantly, in achieving such coordination, one cannot deny the central role of WTO organs, especially the WTO dispute settlement system, which enables such interpretive “cooperation” in the first place.<sup>120</sup> As I show later in Part II.B.1, the particular mandates and functional competences of the WTO political and legal organs afford them much latitude to purposely develop WTO law with consideration for a State’s regulatory freedom to pursue and defend public interests and human rights concerns. But first, the following section discusses the contrast of the “sunburst” scattered law-making trajectory of the international investment treaty regime.

## 2. Investment Law

Unlike WTO law, the investment treaty system<sup>121</sup> is comprised of a defense and “automized”<sup>122</sup> network of thousands of bilateral and regional international investment agreements (IIAs). While a few IIAs are negotiated within the context of broader inter-State trade negotiations,<sup>123</sup> for the most part many of the current investment treaties were separately concluded by states according to their own foreign policy agendas, economic priorities, and political programs.<sup>124</sup> Long before the controversial collapse of multilateral negotiations in 1997 in regard to the proposed Multilateral Agreement on Investment (MAI),<sup>125</sup>

*Id.*

119. Peter Hilpold, *Human Rights and WTO Law: From Conflict to Coordination*, 45 ARCHIV DES VÖLKERRECHTS 4, 484, 509, 513 (2007).

120. Joost Pauwelyn, *Cooperation in Dispute Settlement: Human Rights in WTO Dispute Settlement*, in HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 52, at 205–31.

121. Stephan Schill has been the foremost proponent of viewing the network of international investment agreements as leading towards a genuine multilateral system. See STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 65–117 (2009).

122. Anna Joubin-Bret et al., *International Investment Law and Development*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW, *supra* note 38, at 19.

123. See Diane A. Desierto, *Development as an International Right: Investment in the New Trade-Based IIAs*, 3 TRADE L. & DEV. 296 (2011).

124. Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT. L. & POL’Y 157 (2005).

125. See Eric Neumayer, *Multilateral Agreement on Investment: Lessons for the WTO from the Failed OECD Negotiations*, 46 WIRTSCHAFTSPOLITISCHE BLÄTTER 618 (1999). Trebilcock and Howse have also described the political dynamics that took over the MAI negotiations and ultimately led to their breakdown.

By May 1997, agreement had been reached between the negotiators on many

States had already been concluding IIAs on a bilateral basis, beginning with the first bilateral investment treaty (BIT) concluded by Germany

---

elements of the basic architecture of the MAI [Multilateral Agreement on Investment], including MFN and National Treatment. However, important differences of view between countries were surfacing with respect to the relationship of the MAI to environmental and labour standards and cultural policies. As well, considerable disagreement existed concerning whether and how investment incentives should be disciplined, the result being that incentives were simply not dealt with in the draft. At the same time, however, a vigorous public debate was beginning in OECD countries such as Canada, the United States and Australia concerning the impact of the MAI on the democratic regulatory state in general, and on environment, labour rights and cultural protection more specifically. Canadian activist groups were at the forefront of bringing the MAI negotiations into public view. In January 1997, when no public version of the negotiating text was available, Canadian activists obtained a confidential version, and began circulating it to like-minded groups, using the internet as an effective dissemination tool. In April 1997, accounts of the MAI began to appear in the popular press, and governments were placed on the defensive to justify their negotiating positions to the public at large. Some of the groups in question had unsuccessfully challenged the Canada-US FTA and the NAFTA, often making grossly exaggerated and hypothetical claims about the damage likely to flow from these agreements to the welfare state. With the MAI, their approach was shrewder and more careful. They linked a more general critique of globalization driven by corporate interests with a highly plausible analysis of specific provisions of the draft MAI, or omissions from it, as well as a critique of the way it was negotiated. While many groups took different and overlapping positions, the thrust of the overall attack is well expressed by Tony Clarke and Maude Barlow:

We do not wish to leave the impression that we reject the idea of a global investment treaty. We are well aware that transnational investment flows have been accelerating at a rapid pace and that there is a need to establish some global rules. But the basic premise on which the draft versions of the MAI have been crafted is, in our view, largely flawed and one-sided. It expands the rights and powers of transnational corporations without imposing any corresponding obligations. Instead, the draft treaty places obligations squarely on the shoulders of governments . . . Meanwhile the MAI says nothing about the rules that transnational corporations must follow to respect the economic, social, cultural, and environmental rights of citizens.

The secrecy surrounding the negotiations and the usual cloak-and-dagger behavior by foreign ministries when faced by early enquiries about the course of the negotiations gave *prima facie* credence to a conspiratorial view of the whole undertaking. The fact, noted above, that the draft MAI did not contain an environmental or health and safety exception even comparable to that existing in the 1947 GATT lent credibility to the notion that only the interests of capital were reflected in the Agreement.

See TREBILCOCK & HOWSE, *supra* note 13, at 458–60.

and Pakistan in 1959 and entering into force in 1962.<sup>126</sup>

The progressive march of investment treaty texts (and their underlying bargaining histories) gives tangible evidence of the ideological shifts that accompanied the evolving global economic order, from the postcolonial emergence of new capital-importing States and the initial dominance of capital-exporting States in North-South treaty negotiations to the recent rise of emerging market players and developing countries as new capital-exporters in more complex South-South and South-North configurations.<sup>127</sup> Ernst-Ulrich Petersmann describes the “first generation” of BITs as those that were concluded from 1959 until around 1969 between countries of the capital-exporting and developed North and the capital-importing and developing South, and whose standards of protection were minimally designed to reduce “the legal insecurity resulting from the post-colonial disagreements on the customary international ‘minimum standard’ for the protection of foreign property and the payment of ‘full, prompt, and effective compensation’ in case of expropriation of foreign property.”<sup>128</sup> He describes the “second generation” of BITs (treaties concluded from 1969 until about 2003) as reflecting a

more “common form” . . . based on uniform objectives, structures and standard clauses providing also for investor-state arbitration . . . [t]he increasingly comprehensive legal and judicial protection of foreign investments was also due to increasing recognition that “FDI-led industrialization” tended to promote more competitive industries than the widespread policies of ‘infant industry protection’ since the 1960s.<sup>129</sup>

It is the third, or the “new” generation of BITs (concluded from 2003 onward) that, in Petersmann’s view, already acknowledges “the need for ‘rebalancing’ [of] the private and public interests involved in foreign investments . . . clarifying the state’s rights and duties to regulate and protect public interests.”<sup>130</sup>

Given the tremendous diversity of IIA texts, it would be impossible

---

126. U.N. Conference on Trade and Dev., *The Entry Into Force of Bilateral Investment Treaties (BITs)*, IIA Monitor No. 3 (2006), at 3, available at [http://www.unctad.org/en/Docs/webiteia20069\\_en.pdf](http://www.unctad.org/en/Docs/webiteia20069_en.pdf).

127. See Kate Miles, *International Investment Law: Origins, Imperialism and Conceptualizing the Environment*, 21 COL. J. INT’L ENVTL. L. & POL’Y 1 (2010); VANDEVELDE, *supra* note 42, at 19–74; Ahmad Ali Ghouri, *The Evolution of Bilateral Investment Treaties, Investment Treaty Arbitration, and International Investment Law*, 14 INT’L ARBITRATION L. REV. 189 (2011).

128. PETERSMANN, *supra* note 19, at 289–90.

129. *Id.* at 290.

130. *Id.*

to identify all the treaty provisions that trigger the issue of a State's regulatory freedom to pursue public interest or human rights concerns.<sup>131</sup> What is clear, thus far, is that host State defenses anchored on regulatory freedom to ensure compliance with human rights have not made much headway yet in investment arbitral jurisprudence,<sup>132</sup> usually due to the lack of development of the argument by the State concerned,<sup>133</sup> or the fact that *amicus* submissions have not yet succeeded in speaking directly and in depth to the precise legal and factual issues of an investment arbitration when they put forward arguments based on human rights and the public interest.<sup>134</sup> In *Suez v. Argentina*, for example, after a thirty-page *amicus* submission that generally discussed the significance of the rights to water and to health in the arbitration, the arbitral tribunal simply observed that Argentina "was subject to both international obligations, *i.e.* human rights obligations and treaty obligations, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive."<sup>135</sup> While host States have generally raised the issue of State regulatory freedom to pursue public interest or human rights concerns as a defense in numerous

---

131. See Suzanne A. Spears, *Making Way for the Public Interest in International Investment Agreements*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* (Chester Brown & Kate Miles eds., 2011); Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037 (2010).

132. See Diane A. Desierto, *Calibrating Human Rights and Investment in Economic Emergencies: Prospects of Treaty and Valuation Defenses*, 9 MANCHESTER J. INT'L ECON. L. 162 (2012) [hereinafter Desierto, *Calibrating Human Rights*]; Diane A. Desierto, *Conflict of Treaties, Interpretation, and Decision-Making on Human Rights and Investment During Economic Crises*, 10 TRANSNAT'L DISP. MGMT. 1 (2013) [hereinafter Desierto, *Conflict of Treaties*].

133. Desierto, *Calibrating Human Rights*, *supra* note 132; Desierto, *Conflict of Treaties*, *supra* note 132; see *Siemens AG v. Argentina*, Award, ICSID Case No. ARB/02/8 (2007).

[T]he "tribunal notes the reference made by Argentina to international human rights law ranking at the level of the Constitution after the 1994 constitutional reform and implying that property rights claimed in this arbitration, if upheld, would constitute a breach of international human rights law. This argument has not been developed by Argentina. The Tribunal considers that, without the benefit of further elaboration and substantiation by the parties, it is not an argument that, *prima facie*, bears any relationship to the merits of this case.

See also Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration*, in *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 82, 89–90 (Pierre-Marie Dupuy et. al. eds., 2009).

134. See Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT'L L. 200 (2012).

135. *Suez v. Argentina*, Decision on Liability, ICSID Case No. ARB/03/19 (2010), ¶ 262.

investment treaty arbitrations<sup>136</sup> involving alleged breaches of different treaty standards, such as indirect expropriation<sup>137</sup> or the fair and equitable treatment standard,<sup>138</sup> ultimately the success (or failure) of these defenses turned on the arbitral tribunals' interpretation of the IIA standards involved.<sup>139</sup> This has spurred newer IIAs to include substantive standards that could facilitate a host State's policy flexibility, such as: (1) "in accordance with host State law" clauses;<sup>140</sup> (2) stabilization clauses;<sup>141</sup> (3) exceptions clauses or "measures not precluded" clauses;<sup>142</sup> (4) the investment definition clause or similar

---

136. Although there are cases involving other states such as *Unglaube v. Costa Rica*, Award, ICSID Case No. ARB/08/1 (2012) (involving an expropriation finding arising from regulatory actions taken by Costa Rica to create an ecological zone protecting the endangered leatherback sea turtles and their nesting sites), as well as *Tecnicas Medioambientales Tecmed v. Mexico*, Award, ICSID Case No. ARB (AF)/00/2 (2003) (also involving an expropriation finding in relation to a Mexican government agency's Resolution ordering closure of a landfill for environmental reasons), the cases involving the Argentina financial crises of 2000–2002 are probably the most famous examples of failed attempts to justify social protection measures on the basis of human rights, public policy, or public interest reasons. For a list of cases, see *infra* note 159.

137. See U.N. Conference on Trade and Dev., Expropriation, UNCTAD Series on Issues in International Investment Agreements II (2012), at 78–90 (surveying State assertions of their right to regulate, as seen in both investment jurisprudence and treaty practices), available at [http://unctad.org/en/docs/unctaddiaeia2011d7\\_en.pdf](http://unctad.org/en/docs/unctaddiaeia2011d7_en.pdf).

138. U.N. Conference on Trade and Dev., Fair And Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II (2012), at 68–77 (surveying the "legitimate expectations" element in the FET standard and State assertions of the right to regulate in investment jurisprudence), available at [http://unctad.org/en/docs/unctaddiaeia2011d5\\_en.pdf](http://unctad.org/en/docs/unctaddiaeia2011d5_en.pdf).

139. For a more optimistic assessment of human rights-inclusive interpretation of IIA standards, see Susan L. Karamanian, *Human Rights Dimensions of Investment Law*, in *HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS* 236 (Erika De Wet & Jure Vidmar eds., 2012).

140. Christoph Schreuer & Ursula Kriebaum, *From Individual to Community Interest in International Investment Law*, in *FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA* 1079, 1095 (Ulrich Fastenrath et al. eds. 2011) [hereinafter *FROM BILATERALISM TO COMMUNITY INTEREST*]; Pierre-Marie Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, in *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION*, *supra* note 133, at 59–60.

141. On the argument that foreign investors and host states effectively contract around the risk of changes in the applicable regulatory framework to the investment, see Sam Foster Halabi, *Efficient Contracting Between Foreign Investors and Host States: Evidence from Stabilization Clauses*, 31 *Nw. J. INT'L L. & BUS.* 261 (2011). Note that an arbitral tribunal has ruled that stabilization clauses "do not 'cap' damages for the purposes of valuing the Claimants' rights, nor do they establish a ceiling of compensation beyond which the Claimants could not have legitimately expected to recover in the event of an expropriation." *Kardassopoulos v. Ga.*, Award, ICSID Case Nos. ARB/05/18 & ARB/07/15 (2010), ¶ 485.

142. *DESIERTO*, *supra* note 34, at 167–70; U.N. Conference on Trade and Dev., *The Protection of National Security in IIAs* (2009), available at [http://unctad.org/en/Docs/diaeia20085\\_en.pdf](http://unctad.org/en/Docs/diaeia20085_en.pdf).

treaty applicability provisions;<sup>143</sup> and (5) balance of payments provisions and other financial crises provisions.<sup>144</sup>

The “in accordance with host State law” clauses in IIAs (e.g., treaty provisions that require that an investment be made “in accordance with host State law”) have been put forward as possible gateways for international human rights treaties when the latter is incorporated in host State law.<sup>145</sup> However, this theory has not yet been tested in actual investment jurisprudence. Thus far, arbitral tribunals have tended to interpret these kinds of clauses in a circumscribed manner. For one, the “in accordance with host State law” clause does not require an investment’s compliance with every host State regulation, administrative issuance, or law—it generally refers to those species of host State law that are of such fundamental importance that they must be included in the due diligence to be conducted by the investor and the host State.<sup>146</sup> While there is a line of arbitral awards that narrowly identifies host State’s corporate registration requirements as the only “law” contemplated by this clause,<sup>147</sup> there are also other arbitral awards

143. See Desierto, *supra* note 123; see also Diane A. Desierto, *Deciding IIA Applicability: The Development Argument in Investment*, in INVESTMENT LAW WITHIN INTERNATIONAL LAW: AN INTEGRATIONIST PERSPECTIVE (Freya Baetens ed., 2013). For a list of cases, see *infra* note 163.

144. 2009 ASEAN Comprehensive Investment Agreement art. 16, Feb. 26, 2009; 2008 Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations art. 21; 2009 Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea art. 11, June 2, 2009; 2009 Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the People’s Republic of China art. 11, Aug. 15, 2009.

145. From BILATERALISM TO COMMUNITY INTEREST, *supra* note 140; HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION, *supra* note 133.

146. *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, Award, ICSID Case No. ARB/03/25 (2007), ¶ 396.

When the question is whether the investment is in accordance with the law of the host State, considerable arguments may be made in favour of construing jurisdiction *ratione materiae* in a more liberal way which is generous to the investor. In some circumstances, the law in question of the host State may not be entirely clear and mistakes may be made in good faith. An indicator of a good faith error would be the failure of a competent legal counsel’s legal due diligence report to flag that issue.

*Id.* On the other hand, a host state unsuccessfully attempted to argue the “non-resident” character of tax treatment in order to deny that an investment met the territorial requirement “in accordance with its laws and regulations.” *Societe Generale de Surveillance SA v. Philippines*, Decision on Objections to Jurisdiction, ICSID Case No. ARB/02/6 (2004), ¶¶ 99–112.

147. *Veteran Petroleum v. Russia*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 228 (2009), ¶¶ 20–21; *Yaung Chi Oo Trading Pte v. Myanmar*, 42 ILM 540

that suggest that the clause applies to other sources of law that are consistent with the teleological purposes of an IIA,<sup>148</sup> such as anti-dummy legislation, bribery laws, contractual fraud, and central bank regulations.<sup>149</sup> In order to avail of this clause to justify its exercise of regulatory freedom to pursue public interest or human rights concerns, the host State would have to show that its ongoing compliance with the mass of its international human rights obligations also belongs to those corpus of “fundamental” laws notified to the investor at the outset as necessary to qualify the investment as a covered or protected investment under the IIA.<sup>150</sup> This approach contains its own set of complexities, least of which is building the appropriate due diligence process and transparent information infrastructure<sup>151</sup> for the investor to be genuinely and timely notified of a host State’s continuing international human rights obligations (including how the investment may or may not affect compliance with such obligations) in order to avoid any pretextual or trope assertions of human rights defenses by the host State during the life of the investment.<sup>152</sup>

Stabilization clauses have also not featured prominently in investment jurisprudence, although there is considerable literature advocating their inclusion in both foreign investment contracts as well as IIAs to ensure that host States’ international human rights obligations are also deemed part of the investment regulatory framework.<sup>153</sup> IIA

(2003), ¶ 62; *Siag v. Egypt*, Decision on Jurisdiction, ICSID Case No. ARB/05/15 (2007), ¶¶ 198–201; *Middle E. Cement Shipping & Handling Co. v. Egypt*, Award, ICSID Case No. ARB/99/6 (2002), ¶¶ 131–38.

148. *Salini Costruttori v. Morocco*, Decision on Jurisdiction, ICSID Case No. ARB/00/4 (2001), ¶ 46. This standard was expressly adopted by the arbitral tribunal in *Mytilineos Holdings v. Serbia and Montenegro*, Partial Award on Jurisdiction, UNCITRAL (2006), ¶ 152.

149. *Fraport AG Frankfurt Airport Servs. Worldwide v. Philippines*, Award, ICSID Case No. ARB/03/25 (2007) (involving local anti-dummy legislation); *World Duty Free Co. v. Kenya*, Award, ICSID Case No. ARB/00/7 (2006) (involving local bribery laws); *Inceysa Vallisoletane v. El Salvador*, Award, ICSID Case No. ARB/03/26 (2006) (involving local contract principles against undue enrichment and fraud); *Anderson v. Costa Rica*, Award, ICSID Case No. ARB (AF)/07/3 (2010), ¶¶ 55–59.

150. *Desierto*, *Conflict of Treaties*, *supra* note 132, at 80.

151. See Markus W. Gehring, *Impact Assessments of Investment Treaties*, in *SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW*, *supra* note 38, at 145–70; Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT’L & COMP. L.Q. 573 (2011).

152. One is minded to recall a famous essay pointing out the broad abstractions involved in marshalling human rights arguments in trade law disputes, or assuming that dispute settlement tribunals will find human rights norms to be decisive in resolving trade disputes. Robert Howse, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 EUR. J. INT’L L. 651 (2002).

153. See Lorenzo Cotula, *Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilization Clauses*, 1 J. WORLD ENERGY L. & BUS. 158 (2008); Sheldon Leader, *Risk Management, Project Finance and Rights-based Development*, in *GLOBAL PROJECT FINANCE, HUMAN RIGHTS AND SUSTAINABLE*



provisions “on the mutual obligation of parties to provide ‘full protection and security’ and to ensure ‘fair and equitable treatment’ of investments . . . may confer treaty status on the stabilization clauses in an investment contract.”<sup>154</sup> Some recent innovations to the design of stabilization clauses expressly exempt from stabilization those changes in law, regulations, or policies, which are reasonably required to ensure that host States to meet international human rights obligations.<sup>155</sup> These are likewise incipient proposals untested thus far in investor-State arbitration.

Owing largely to the arbitrations involving measures taken by the Argentine government during its 2000–2002 financial crisis, arbitral tribunals in the past decade have had more occasions to engage in the interpretation of exceptions clauses or “measures not precluded” clauses.<sup>156</sup> What is immediately evident from the genre of exceptions clauses in IIAs is that they are not all similarly worded, with some reflecting detailed language resembling GATT Article XX and GATS

---

DEVELOPMENT 107, 121 (Sheldon Leader & David Ong eds., 2011).

If lenders and borrowers are to create projects able to give adequate place to the avoidance of damage . . . it may be necessary at certain points to carve out exceptions to the classic non-recourse model . . . this might only be a realistic prospect if either the sponsor is required to help meet the company’s shortfall in funds, or the lender relaxes its reimbursement schedule to make room for such delays. Negotiation among the parties, reflecting the impact of CSR would add this necessary element of flexibility to the positions . . .

*Id.*; Lorenzo Cotula, *Freezing the Balancing Act? Project Finance, Legal Tools to Manage Regulatory Risk, and Sustainable Development*, in GLOBAL PROJECT FINANCE, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT, *supra*, at 142, 144, 162 (observing that while “increasingly broad stabilization clauses tend to ensure a level of regulatory stability that far exceeds that accorded by international law under regulatory taking doctrine,” while proposing two options for the construction and treatment of stabilization clauses to reflect sustainable development compliance—“(a) carefully limiting the scope of stabilization clauses; and (b) adopting an evolutionary approach to their application.”).

154. Evaristus Oshionebo, *Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic, and Social Implications for Developing Countries*, 10 ASPER REV. INT’L BUS. & TRADE L. 1, 25 (2010). Although note that an arbitral tribunal expressly rejected viewing an IIA’s fair and equitable treatment standard as bearing the same purpose as stabilization clauses specifically granted to foreign investors. See EDF (Servs.) Ltd. v. Romania, Award, ICSID Case No. ARB/05/13 (2009), ¶ 218.

155. See also Jernej Letnar Čer nič, *Corporate Human Rights Obligations Under Stabilization Clauses*, 11 GERMAN L.J. 210 (2010) (also arguing that beyond the interpretation of the stabilization clauses in light of the fundamental human rights obligations of corporate investors, such investor obligations be explicitly included in international investment agreements); Full text of BTC Human Rights Undertaking (2003), available at <http://subsites.bp.com/caspian/Human%20Rights%20Undertaking.pdf>.

156. DESIERTO, *supra* note 34, at 145–236 ch.5.

Article XIV,<sup>157</sup> while others tersely referring only to “essential security interests” without explicitly providing for the effect of the host State’s invocation of such “necessary” measures on IIA obligations.<sup>158</sup> The Argentine arbitrations have, by and large, generally rejected Argentina’s proposed theory that interpreted various exceptions clauses in Argentine BITs, (e.g., resulting in the outright inapplicability of such treaties (and thus, preventing the existence of any treaty breach from arising) the moment the exception is invoked).<sup>159</sup> There has not yet been any arbitral jurisprudence where a host State has invoked an exceptions clause that is worded identically with (or clearly traces its drafting genealogy to) GATT Article XX or GATS Article XIV;<sup>160</sup> further, it is impossible to

---

157. 2004 Dominican Republic-Central America-United States Free Trade Agreement art. 10.9.3(c); 2005 United States/Uruguay BIT art. 8(3)(c); 1992 North American Free Trade Agreement art. 1106; 1994 Energy Charter Treaty art. 24(2)(b)(i); 2009 ASEAN Comprehensive Investment Agreement, Feb. 26, 2009 art. 17 [hereinafter ACIA]; see, e.g., Clause III of the detailed Annex I (General and Specific Exceptions) to the 1997 Canada/Lebanon BIT art. XVII(2) & (3) of the 1996 Canada/Panama BIT art. XVII of the 1997 Canada/Thailand BIT art. XVII of the 1996 Canada/Barbados BIT art. XVII of the 1996 Canada/Ecuador BIT art. XVII of the 1996 Canada/Egypt BIT, Clause III of the detailed Annex I (General and Specific Exceptions) to the 1999 Canada/El Salvador BIT, Clause III of the detailed Annex I (General and Specific Exceptions) to the 1998 Canada/Costa Rica BIT, Clause III of the detailed Annex I (General and Specific Exceptions Special Provisions) to the 1997 Canada/Croatia BIT art. XVII of the 1995 Canada/Latvia BIT art. XVII of the 1996 Canada/Romania BIT art. XVII of the 1995 Canada/South Africa BIT art. XVII of the 1995 Canada/Trinidad and Tobago BIT art. XVII of the 1994 Canada/Ukraine BIT, Clause III in the detailed Annex I (General and Specific Exceptions Special Provisions) to the 1997 Canada/Uruguay BIT, Clause II of detailed Annex to the 1996 Canada/Venezuela BIT, and Article XVII of the 1997 Canada/Armenia BIT]; see, e.g., non-conforming measures under Article 16 of the 2002 Japan/Korea BIT art. 15 of the 2003 Japan/Vietnam BIT, and Article 18 (General and Security Exceptions) of the 2008 Japan/Lao People’s Democratic Republic BIT).

158. For a survey of these types of treaty language, see Katia Yannaca-Small, *Essential Security Interests under International Investment Law*, in INTERNATIONAL INVESTMENT PERSPECTIVES: FREEDOM OF INVESTMENT IN A CHANGING WORLD (2007), available at <http://www.oecd.org/investment/investmentpolicy/40243411.pdf>.

159. See, e.g., LG&E Energy Corp. v. Argentina, Decision on Liability, ICSID Case No. ARB/02/1 (2006), ¶¶ 213–66; Sempra Energy Int’l v. Argentina, Decision on Argentina’s Request for Annulment of the Award, ICSID Case No. ARB/02/16 (2010), ¶¶ 106–223; CMS Gas Transmission Co. v. Argentina, Award, ICSID Case No. ARB/01/8 (2005), ¶¶ 315–92; Enron Corp. v. Argentina, Award, ICSID Case No. ARB/01/3 (2007), ¶¶ 303–39; Cont’l Cas. Co. v. Argentina, Award, ICSID Case No. ARB/03/9 (2008), ¶¶ 219–85; BG Grp. Plc. v. Argentina, Final Award, Ad hoc (UNCITRAL) (2007), ¶¶ 361–444; Nat’l Grid Plc. v. Argentina, Award, Ad hoc (UNCITRAL) (2008) ¶¶ 205–62; Suez v. Argentina, Decision on Liability, ICSID Case No. ARB/03/19 (2010), ¶¶ 249–71; Total S.A. v. Argentina, Decision on Liability, ICSID Case No. ARB/04/1 (2010), ¶¶ 482–85; El Paso Energy Int’l Co. v. Argentina, Award, ICSID Case No. ARB/03/15 (2011), ¶¶ 552–670; Impregilo S.p.A. v. Argentina, Final Award, ICSID Case No. ARB/07/17 (2011), ¶¶ 336–60; Metalpar S.A. SA v. Argentina, Award on the Merits, ICSID Case No. ARB/03/5 (2008), ¶¶ 208–11.

160. *Continental Casualty v. Argentina* involved a measures not precluded clause (Article XI of the Argentina-United States BIT) that did not in any way resemble GATT Article XX in

forecast for now if investment arbitral tribunals would, in the future, be able to construe their mandates, methodologies, and arbitral competences as liberally as the WTO Appellate Body and dispute settlement panels have done insofar as the interpretation of the GATT Article XX and GATS Article XIV exceptions. Such being the case, the ultimate usefulness of exceptions clauses as the treaty vehicle for ensuring States' regulatory freedom to pursue human rights or public interest concerns still remains very much a question for treaty draftsmanship.

Turning to the definition of "investment", as well as other provisions that could carve out treaty applicability, one finds similar dissonance in investment arbitral jurisprudence on the requisite criteria of "investment," and whether the same should involve a requirement that the supposed investment make a "contribution to the economic development of the host state."<sup>161</sup> I have discussed elsewhere,<sup>162</sup> the majority of arbitral tribunals thus far have preferred to regard this aspect as a mere feature, and not a definitive criterion or threshold requirement to establish the existence of an investment.<sup>163</sup> In practice, however, many tribunals have found that "contribution to a host State's development" is a relatively easy standard for investors to satisfy,<sup>164</sup> so

---

the least, but the tribunal in that one case strangely saw fit to use GATT Article XX and WTO jurisprudence interpreting GATT Article XX to interpret Article XI of the Argentina-U.S. BIT. See Diane A. Desierto, *Necessity and 'Supplementary Means of Interpretation' for Non-Precluded Measures in Bilateral Investment Treaties*, 31 U. PA. J. INT'L L. 827 (2010).

161. *Salini Costruttori SpA v. Morocco*, Decision on Jurisdiction, ICSID Case No. ARB/00/4 (2003), ¶ 52.

[D]octrine generally considers that investment infers: contributions, a certain duration of the performance of the contract and a participation in the risks of the transaction . . . In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.

*Id.*

162. Vandevelde, *supra* note 124.

163. *Bureau Veritas v. Paraguay*, Decision on Objection to Jurisdiction, ICSID Case No. ARB/07/9 (2009), ¶¶ 82, 83, 94, 96; *Pantechniki SA Contractors & Engineers v. Albania*, Award, ICSID Case No. ARB/07/21, (2009), ¶¶ 36, 43, 38; *Fakes v. Turkey*, Award, ICSID Case No. ARB/07/20 (2010), ¶ 111; *Alpha Projektholding GMBH v. Ukraine*, Award, ICSID Case No. ARB/07/16 (2010), ¶¶ 312–13; *Consortio Groupement LESI v. Algeria*, Decision on Jurisdiction, ICSID Case No. ARB/05/3 (2006), ¶¶ 72–73; *Phoenix Action Ltd. v. Czech Republic*, Award, ICSID Case No. ARB/06/5 (2009), ¶¶ 114–15; *Malicorp Ltd. v. Egypt*, Award, ICSID Case No. ARB/08/18 (2011), ¶ 113; *Global Trading Resource Corp. v. Ukraine*, Award, ICSID Case No. ARB/09/11 (2010); *RSM Prod. Corp. v. Grenada*, Award, ICSID Case No. ARB/05/14 (2009), ¶¶ 244, 264; *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, ICSID Case No. ARB/06/18 (2010), ¶ 273.

164. For the few awards that denied the existence of a covered investment under an IIA,

long as some linkage—no matter how attenuated—could be shown between the investment and a favorable economic outcome in the host State.<sup>165</sup>

IIA practices further show how States differentiate between aspects of social protection and the public interest for which they design relative policy flexibility (e.g., non-applicability of IIA standards to certain measures), as opposed to absolute policy flexibility (e.g., complete inapplicability of the entire IIA). Many IIAs show that States favor relative policy flexibility for most public policy areas,<sup>166</sup> and rarely reserve absolute policy flexibility except for key sovereign functions such as taxation matters.<sup>167</sup>

---

see *Malaysia Historical Salvors v. Malaysia*, Award on Jurisdiction, ICSID Case No. ARB/05/10 (2007), ¶¶ 123–24; *Joy Mining Mach. Ltd. v. Egypt*, Award on Jurisdiction, ICSID Case No. ARB/03/11 (2004), ¶ 57; *Mitchell v. Democratic Republic of the Congo*, Decision on the Application for Annulment of the Award, ICSID Case No. ARB/99/7 (2006), ¶ 33.

165. *Consortium RFCC v. Morocco*, Decision on Jurisdiction, ICSID Case No. ARB/00/6 (2001), ¶ 65; *Bayindir Insaat Turizm Ticaret ve Sanayi v. Pakistan*, Decision on Jurisdiction, ICSID Case No. ARB/03/29 (2005), ¶ 137; *Toto Costruzioni Generali v. Lebanon*, Decision on Jurisdiction, ICSID Case No. ARB/07/12 (2009), ¶ 86; *Kardassopoulos v. Ga.*, Decision on Jurisdiction, ICSID Case No. ARB/05/18 (2007), ¶¶ 116–17; *Helnan Int'l Hotels v. Egypt*, Decision of the Tribunal on Objection to Jurisdiction, ICSID Case No. ARB/05/19 (2006), ¶ 77; *Saipem S.P.A. v. Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures, ICSID Case No. ARB/05/07 (2007), ¶ 101; *Jan de Nul v. Egypt*, Decision on Jurisdiction, ICSID Case No. ARB/04/13 (2006), ¶ 92; *Noble Energy Inc. v. Ecuador*, Decision on Jurisdiction, ICSID Case No. ARB/05/12 (2008), ¶ 132; *Ceskoslovenska Obchodni Banka v. Slovakia*, Decision on Objections to Jurisdiction and Admissibility, ICSID Case No. ARB/97/4 (2011), ¶ 378; *Societe Generale v. Dominican Republic*, Award on Preliminary Objections to Jurisdiction, LCIA Case No. U.N. 7927 (2008), ¶¶ 16, 30.

166. See 1998 United States/Bolivia BIT, art. II(2)(b) (on intellectual property); 1982 United States/Egypt BIT, Protocol Clause 4 (on ownership of real estate); 1992 North American Free Trade Agreement art. 1108 (Reservations and Exceptions); 2004 Dominican Republic-Central America-United States Free Trade Agreement art. 10.9(3)(b) (making some IIA provisions inapplicable to intellectual property, competition laws, procurement, among others); 2005 United States/Uruguay BIT art. 8(3) (identical to Article 10.9(3) above); 2006 Canada/Peru BIT art. 9(5) (removing public procurement, sovereign subsidies/loans/insurance, and public retirement pension/social security systems from the coverage of national treatment and MFN obligations in the IIA); 2009 Canada/Czech Republic BIT art. IV(2) (removing sovereign subsidies, grants, and government-supported loans from national treatment and MFN obligations); 2010 Canada/Slovakia BIT art. IV(2) (removing obligations as a member of a customs, economic or monetary union, common market, or free trade area from the coverage of national treatment and MFN obligations); 2007 Hungary/Azerbaijan BIT art. 3(3) (removing obligations as a member of a customs, economic or monetary union, common market, or free trade area from the coverage of national treatment and MFN obligations); 2007 Hungary/Jordan BIT art. 3(3) (removing obligations as a member of a customs, economic or monetary union, common market, or free trade area from the coverage of national treatment and MFN obligations); 1994 United States/Jamaica BIT art. II(9) (which does not apply MFN obligations to advantages accorded by either State to third-country investors under free trade or customs unions agreements or GATT).

167. See 2009 Canada/Jordan BIT art. 10(6) (“The provisions of this Agreement shall not

Interestingly, balance of payments and financial crises provisions in new IIAs probably represent the clearest instances to date of the direct incorporation of provisions from WTO law into investment law. Newer generations of IIAs contain language purposely identical to GATT Article XII and GATS Article XII (provisions in international trade law that authorize States to impose certain restrictions in order to safeguard their balance of payments position).<sup>168</sup> Recent investment agreements concluded by the Association of Southeast Asian Nations (ASEAN)—a region particularly alert to currency risks and capital flight after its experience with the 1998 Asian financial crisis— all contain extensive provisions authorizing States to take temporary “measures to safeguard balance of payments,” such as restrictions on transfers of capital.<sup>169</sup> These provisions appear more detailed (and are worded in a more expansive and self-judging manner) than other IIAs that only recognize States’ rights to equitably exercise sovereign powers to temporarily

---

apply to investments in cultural industries.”); 1988 China/New Zealand BIT art. 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . .”); 1999 Argentina/New Zealand BIT art. 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . .”); 1985 China/Singapore BIT art. 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . .”); 2002 Spain/Bosnia and Herzegovina BIT art. 12(2) (“The treatment granted under this Agreement shall not apply to tax matters.”); 1995 Czech Republic/Singapore BIT art. 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . .”); 1993 Poland/Singapore BIT art. 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . .”); 1995 Russian Federation/Hungary BIT art. 11(2) (“The provisions of this Agreement shall not apply to taxation matters.”); 1993 Russian Federation/Denmark BIT arts. 11(2) & (3) (“This Agreement shall not apply to the Faroe Islands and Greenland . . . The provisions of this Agreement shall not apply to taxation.”); 1999 Slovenia/Singapore BIT art. 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . .”); 2002 Spain/Jamaica BIT art. 12(2) (“The treatment granted under this Agreement shall not apply to tax matters.”); 1995 Singapore/Pakistan BIT art. 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . .”); 2005 Uganda/Belgium-Luxembourg Economic Union BIT art. 4(4) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . .”); 1995 Sweden/Russian Federation BIT art. 11(2) (“The provisions of this Agreement shall not apply to taxation matters, except as follows: Article 4, 6, 8, and 9 may apply to taxes imposed by a Contracting Party but only if such taxes have an effect equivalent to expropriation.”); 1997 Hungary/Singapore BIT art. 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . .”); 2004 China/Uganda BIT art. 3(5) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party . . .”).

168. General Agreement on Tariffs and Trade art. XII (Restrictions to Safeguard the Balance of Payments); General Agreement on Trade in Services art. XII (Restrictions to Safeguard the Balance of Payments). See Chantal Thomas, *Balance of Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order*, 15 AM. U. INT’L L. REV. 1249, 1255–61 (2000).

169. See *supra* note 144.

limit transfers during exceptional balance of payments difficulties. United Kingdom BITs, for example, often put a cap on the period for imposing restrictions and the extent of such restrictions, while stipulating a mandatory minimum amount to be transferred annually.<sup>170</sup> Hungarian BITs tend to use more general language focusing on standards of equitableness, non-discrimination, and good faith.<sup>171</sup> Czech BITs focus on assessing restrictive measures from international standards of non-discrimination, equitableness, and good faith rather than specific contours of restrictions.<sup>172</sup> Italian BITs do not specify the exact terms of what should comprise host States' restrictions to protect their balance of payments position, other than to prescribe that such measures should conform to international legal standards of equitableness, non-discrimination, and good faith,<sup>173</sup> similar to the characteristics of Mexico BITs.<sup>174</sup> Netherlands BITs stress the importance of a restriction's consistency with the International Monetary Fund's rules on transfer restrictions,<sup>175</sup> while Australian BITs confine their treaty language to simply recognizing States' inherent rights "in exceptional balance of payments difficulties, to exercise equitably and in good faith powers conferred by its law"<sup>176</sup> to restrict outgoing capital transfers. Canadian BITs favor affording host States

---

170. 1987 United Kingdom/Jamaica BIT art. 4(2)(b); 1987 United Kingdom/Antigua and Barbuda BIT art. 6(1); 1990 United Kingdom/Argentina BIT art. 6(4); 1988 United Kingdom/Benin BIT art. 6; 1988 United Kingdom/Grenada BIT art. 6(1); 1985 United Kingdom/Haiti BIT art. 6; 1987 United Kingdom/Hungary BIT art. 7(2); 1981 United Kingdom/Malaysia BIT art. 5; 1986 United Kingdom/Malta BIT art. 6(1); 1986 United Kingdom/Mauritius BIT art. 6; 1990 United Kingdom/Morocco BIT art. 7; 1987 United Kingdom/Poland BIT art. 6(1); 1989 United Kingdom/Tunisia BIT art. 6; 1991 United Kingdom/Turkey BIT, Article 6(1).

171. 2007 Hungary/Azerbaijan BIT arts. 13(2)(a) & (b); 2007 Hungary/Jordan BIT arts. 13(2)(a) & (b).

172. 1998 Czech Republic/Costa Rica BIT art. 6(4); 1995 Czech Republic/Philippines BIT, Clause 3 of the Protocol; 2002 Czech Republic/Mexico BIT, Article 6(5).

173. 1993 Jamaica/Italy BIT art. 6(1)(c); 2004 Italy/Yemen BIT art. VI(4); 2004 Italy/Nicaragua BIT art. VI(4).

174. 2005 Australia/Mexico BIT art. 9(4); 1998 Austria/Mexico BIT art. 7(6); 1998 Belgium-Luxembourg Economic Union/Mexico BIT art. 6(6); 2000 Denmark/Mexico BIT art. 6(5); 1999 Finland/Mexico BIT art. 7(4); 2000 Greece/Mexico BIT art. 7(4); 2007 India/Mexico BIT art. 8(4); 2005 Iceland/Mexico BIT art. 6(4); 1999 Italy/Mexico BIT art. 6(4); 2000 Republic of Korea/Mexico BIT, Ad. Article 6 of the Protocol; 1998 Netherlands/Mexico BIT, Ad. Article 4 of the Protocol; 2000 Sweden/Mexico BIT art. 6(4); 2006 Trinidad & Tobago/Mexico BIT art. 8(3); 2006 United Kingdom/Mexico BIT art. 8(4).

175. 2002 Netherlands/Yugoslavia BIT art. 5(3); 2003 Netherlands/Korea BIT, Clause 1 of the Protocol; 1985 Netherlands/Philippines BIT art. 7(1); 1991 Netherlands/Jamaica BIT art. 5(4); 2002 Netherlands/Namibia BIT Ad. art. 5(a) of the Protocol; 1984 Netherlands/Sri Lanka BIT art. 7.

176. *See* 1992 Australia/Indonesia BIT art. VII(1); 1994 Australia/Lao People's Democratic Republic BIT art. 9(1).

more flexibility to respond to balance of payments crises.<sup>177</sup> German BITs, by contrast, tend to contain more specific language on restructuring payment terms after the termination of the balance of payments crises.<sup>178</sup> To date, the IIA balance of payments provisions (*e.g.*, mirroring language from GATT Article XII) have not yet been interpreted by any investment arbitral tribunal.

The foregoing topographic survey of IIA standards shows that both treaty language and the interpretation of States' regulatory freedom to pursue human rights or public interest concerns remain differentiated and nonlinear. Unlike the core set of WTO agreements (and its subsidiary legal sources or WTO soft law), interpretation of IIAs has to be conducted on a piecemeal (and often insular) basis, according to the terms of the IIA at issue before a tribunal at a given point in time, for a

---

177. See, *e.g.*, Agreement Between Canada and the Slovak Republic for the Promotion and Protection of Investments, Can.-Slovk., art. IX(3), July 20, 2010, [http://unctad.org/sections/dite/ia/docs/bits/Canada\\_slovakia\\_new.pdf](http://unctad.org/sections/dite/ia/docs/bits/Canada_slovakia_new.pdf); Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments, Can.-Lat., art. XVII(4), May 5, 2009, *available at* [http://www.unctad.org/sections/dite/ia/docs/bits/canada\\_latvia.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/canada_latvia.pdf); Agreement Between the Government of Canada and the Government of Romania for the Promotion and Protection of Investments, Can.-Rom., art. XVII(4), May 5, 2009, *available at* [http://unctad.org/sections/dite/ia/docs/bits/canada\\_romania.pdf](http://unctad.org/sections/dite/ia/docs/bits/canada_romania.pdf); Agreement Between Canada and the Czech Republic for the Promotion and Protection of Investments, Can.-Czech, art. IX(3), May 6, 2009, *available at* [http://unctad.org/sections/dite/ia/docs/bits/canada\\_czech%20republic.pdf](http://unctad.org/sections/dite/ia/docs/bits/canada_czech%20republic.pdf); Agreement Between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Protection of Investments, Can.-Hung., art. VII(2), Oct. 3, 1991, *available at* [http://unctad.org/sections/dite/ia/docs/bits/canada\\_hungary.pdf](http://unctad.org/sections/dite/ia/docs/bits/canada_hungary.pdf); Agreement Between the Government of Canada and the Government of the Republic of Poland for the Promotion and Protection of Investments, Can.-Pol., art. VII(3), Apr. 6, 1990, *available at* [http://unctad.org/sections/dite/ia/docs/bits/canada\\_poland.pdf](http://unctad.org/sections/dite/ia/docs/bits/canada_poland.pdf).

178. See, *e.g.*, Agreement Between the Federal Republic of Germany and the Republic of Ghana for the Promotion and Reciprocal Protection of Investments, Protocol, Ger.-Ghana, cl. 4, Feb. 24, 1995; Treaty Between the Kingdom of Lesotho and the Federal Republic of Germany Concerning the Encouragement and Reciprocal Protection of Investments, Protocol, Ger.-Lesotho, cl. 5, Nov. 11, 1982, *available at* [http://unctad.org/sections/dite/ia/docs/bits/germany\\_lesotho.pdf](http://unctad.org/sections/dite/ia/docs/bits/germany_lesotho.pdf); Treaty Between St. Lucia and the Federal Republic of Germany Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-St. Lucia, art. 5(2), Mar. 16, 1985, *available at* [http://unctad.org/sections/dite/ia/docs/bits/germany\\_saintlucia.pdf](http://unctad.org/sections/dite/ia/docs/bits/germany_saintlucia.pdf); Treaty Between the Federal Republic of Germany and the Kingdom of Swaziland Concerning the Encouragement and Reciprocal Protection of Investments, Protocol, Ger.-Swaz., cl. 5(b), Apr. 5, 1990, *available at* [http://unctad.org/sections/dite/ia/docs/bits/germany\\_swaziland.pdf](http://unctad.org/sections/dite/ia/docs/bits/germany_swaziland.pdf); Treaty Between the Federal Republic of Germany and the Republic of Namibia Concerning the Encouragement and Reciprocal Protection of Investments, Protocol, Ger.-Namib., cl. 5(c), Jan. 21, 1994; Treaty Between the Federal Republic of Germany and the Kingdom of Nepal Concerning the Encouragement and Reciprocal Protection of Investments, Protocol, Ger.-Nepal, cl. 5, Oct. 20, 1986, *available at* [http://unctad.org/sections/dite/ia/docs/bits/germany\\_nepal\\_gr\\_eng.pdf](http://unctad.org/sections/dite/ia/docs/bits/germany_nepal_gr_eng.pdf); Agreement Between the Federal Republic of Germany and the People's Republic of Bangladesh Concerning the Promotion and Reciprocal Protection of Investments, Protocol, Bangl.-Ger., cl. 4(c), May 8, 1981, *available at* [http://unctad.org/sections/dite/ia/docs/bits/germany\\_bangladesh.pdf](http://unctad.org/sections/dite/ia/docs/bits/germany_bangladesh.pdf).

particular dispute. Short of the direct incorporation of provisions from WTO law, it is perilous to assume that IIA treaty drafters and negotiators indeed intend future arbitral tribunals to use WTO law as some kind of *travaux préparatoires* to interpret IIA standards. After all, interpretation of treaty text according to its terms always antecedes any attempt at recourse to supplementary means of interpretation.<sup>179</sup> Where IIA texts do not lend themselves to ambiguity, or are at least susceptible of interpretation according to their own terms, it is neither necessary nor legitimate to contrive at using WTO law and jurisprudence as proxies for interpretation.

IAs remain central to the applicable law in investor-State dispute settlement.<sup>180</sup> Admittedly, in the absence of parties' choice of law, international law may also form part of the law applicable to an investor-State dispute under Article 42(1) of the ICSID Convention.<sup>181</sup> While the potential overlap between IIA norms and other rules of international law, such as international human rights treaty and customary norms, has received much scholarly attention,<sup>182</sup> using

---

179. Vienna Convention on the Law of Treaties, arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331; Mahnouch H. Arsanjani & W. Michael Reisman, *Editorial Comment: Interpreting Treaties for the Benefit of Third Parties: The 'Salvors' Doctrine' and the Use of Legislative History in Investment Treaties*, 104 AM. J. INT'L L. 597, 600 (2010).

The Vienna Convention's rule in Article 31 thus focuses, through several different lenses, on the text of the instrument and events that follow rather than precede it, as the critical grist for the interpretive exercise . . . [T]he language of Article 32 is facultative and contingent and looks largely to pre-text rather than post-text events . . . [T]his recourse may be exercised only where Article 31's application (1) "leaves the meaning ambiguous or obscure"; or (2) "leads to a result which is manifestly absurd or unreasonable"; or (3) is undertaken to "confirm the meaning resulting from the application of article 31."

180. See CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 610–11 (2001).

181. 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 42, cl. 1, Mar. 18, 1965, 575 U.N.T.S. 159 [hereafter ICSID Convention]; Emmanuel Gaillard & Yas Banifatemi, *The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, 18 ICSID REV. 375, 379–81 (2003); see W. Michael Reisman, *The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold*, 15 ICSID REV. 362, 380 (2000); see generally Annie Leeks, *The Relationship Between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law: The ICSID Approach*, 65 U. TORONTO FAC. L. REV. 1 (2007).

182. U.N. Conference on Trade and Development, *IIA Monitor No. 1: Latest Developments in Investor-State Dispute Settlement*, 15, UNCTAD/WEB/DIAE/IA/2009/7 (2009) (by Luke Eric Peterson), available at [http://unctad.org/en/Docs/webdiaeia20097\\_en.pdf](http://unctad.org/en/Docs/webdiaeia20097_en.pdf); Ursula Kriebaum, *Aligning Human Rights and Investment Protection*, TRANSNAT'L DISP. MGMT., Jan. 2013, at 1; see, e.g., Marc Jacob, *International Investment Agreements and Human Rights*, INEF RESEARCH PAPER SERIES 5 (Mar. 2010), [http://www.humanrights-business.org/files/international\\_investment\\_agreements\\_and\\_human\\_rights.pdf](http://www.humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf); James D. Fry, *International Human Rights Law*



Article 31(3)(c) of the Vienna Convention on the Law of Treaties<sup>183</sup> to integrate human rights in IIA interpretation<sup>184</sup> has not yet been applied in practice in investor-State arbitrations.

### *B. Authoritative Decision-Makers and Interpretive Communities in WTO Law Vis-à-vis Investment Law*

The preceding section outlined key differences in the bases of obligation in WTO law and investment law, as well as some nonlinear interpretations of the public interest and human rights ensuing from each regime. The following subsections briefly show the contrast between the authoritative decision-makers and interpretive communities in WTO law and investment law, and why the former's centralized legal and political organs are functionally better-situated than the latter to achieve harmonized and coordinated interpretation of States' regulatory freedom to pursue public interest and human rights concerns.

#### 1. WTO Law

The mandates and functions of legal and political institutions at the WTO, I submit, contribute to making the system quite amenable to the coordination of trade law rules with the human rights and public interest obligations of the Member States. This is not to say that the system is

---

*in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. COMP. & INT'L L. 77 (2007).

183. *RosInvest Co. UK Ltd. v. Russian Fed'n*, SCC Case No. V079/2005, Award on Jurisdiction, ¶ 39 (Arb. Inst. Stockholm Chamber Com. 2007), [http://opil.ouplaw.com/view/10.1093/law:iic/315-2007.case.1/IIC315\(2007\)D.pdf](http://opil.ouplaw.com/view/10.1093/law:iic/315-2007.case.1/IIC315(2007)D.pdf); *Yukos Universal Ltd. v. Russian Fed'n*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, ¶¶ 260, 309 (Perm. Ct. Arb. 2009), [http://www.encharter.org/fileadmin/user\\_upload/document/Yukos\\_interim\\_award.pdf](http://www.encharter.org/fileadmin/user_upload/document/Yukos_interim_award.pdf); *Veteran Petroleum Ltd v. Russian Fed'n*, PCA Case No. AA 228, Interim Award on Jurisdiction & Admissibility, ¶¶ 260, 309 (Perm. Ct. Arb. 2009), [http://www.encharter.org/fileadmin/user\\_upload/document/Veteran\\_interim\\_award.pdf](http://www.encharter.org/fileadmin/user_upload/document/Veteran_interim_award.pdf); *Hulley Enters. Ltd. v. Russian Fed'n*, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, ¶¶ 260, 309 (Perm. Ct. Arb. 2009), [http://www.encharter.org/fileadmin/user\\_upload/document/Hulley\\_interim\\_award.pdf](http://www.encharter.org/fileadmin/user_upload/document/Hulley_interim_award.pdf); *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, ¶¶ 207–08 (Int'l Center Settlement Investment Disp. 2007), [http://www.encharter.org/fileadmin/user\\_upload/document/Kardassopoulos.pdf](http://www.encharter.org/fileadmin/user_upload/document/Kardassopoulos.pdf); *Berschader & Berschader v. Russian Fed'n*, SCC Case No. V079/2005, Award, ¶ 95 (Arb. Inst. Stockholm Chamber Com. 2007), [http://italaw.com/sites/default/files/case-documents/ita0079\\_0.pdf](http://italaw.com/sites/default/files/case-documents/ita0079_0.pdf); *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, ¶ 90 (Int'l Ctr. Settlement Inv. Disp. 2009), [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1171\\_En&caseId=C5](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1171_En&caseId=C5).

184. See generally Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 678, 691–702 (Christina Binder et al. eds., 2009).

*ipso facto* ideal for ensuring that Member States simultaneously comply with their international human rights obligations as well as their trade obligations, and neither do I take the position that the WTO should be radically transformed into a human rights organization.<sup>185</sup> (To recall, WTO Secretary-General Pascal Lamy had called for “coherence” between WTO law and human rights law,<sup>186</sup> not “co-optation” of one by the other. One can be just as wary of creating a “human rights imperium,”<sup>187</sup> as with the encroachment or “acquisition” of human rights by WTO law<sup>188</sup>). Rather, my lens of observation is limited to the phenomena of the system of governance and adjudication in the WTO, which, at the very least, appears arguably conducive to democratized, consultative, centralized, and transparent decision-making on the spaces of States’ regulatory freedoms to pursue human rights and public interest concerns. The approach largely subscribes to Joel Trachtman’s fairly agnostic and functionalist theory of “constitutional economics” to analyze the WTO—scrutinizing constitutional functions and processes within a system to ascertain how they maximize individual preferences.<sup>189</sup> In my view, the deepening and regularizing dialogue on Member States’ compliance with human rights obligations alongside WTO obligations is, in large part, attributable to the capacity of non-State actors as well as Member States to engage the issue systematically

---

185. Armin von Bogdandy famously cautioned that if the European Union were to be “focused on progressive human rights policy” it would “easily endanger the European constitutional set-up between the Union and the Member States without any real need for protecting human rights, at least as they are traditionally understood.” Armin von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 COMMON MKT. L. REV. 1307, 1337 (2000).

186. Pascal Lamy, Dir.-Gen., Towards Shared Responsibility and Greater Coherence: Human Rights, Trade, and Macroeconomic Policy (Jan. 13 2010), [http://www.wto.org/english/news\\_e/sppl\\_e/sppl146\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl146_e.htm).

187. Michael Barnett put forward a critical comparison between the evolution of the human rights movement and humanitarianism, with the historical concept of empire. “Empires are branded as illegitimate because of their authoritarian qualities, but humanitarian governance is hardly a paragon of democratic rule . . . [T]he legitimacy of humanitarian governance does not depend on a process of deliberation, dialogue, or even consent . . . Humanitarianism has become a big business, and increasingly aid agencies are administered by executive offices that focus on the bottom line and market share. As humanitarian governance has grown, it has become more centralized, more distant from those it wants to help . . . In the typical humanitarian case, the ruling class is made up of well-to-do foreigners, and local populations largely provide security, support, and menial labor in a way that is reminiscent of earlier empires.” MICHAEL BARNETT, *EMPIRE OF HUMANITY: A HISTORY OF HUMANITARIANISM* 221–22 (2011).

188. See Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT’L L. 815, 843 (2002).

189. Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT’L L. 623, 631–33 (2006).

through different levers of WTO governance.<sup>190</sup> That it has not always been completely successful in doing so is a subject left to Part IV of this Article.

The political organs of the WTO collectively contribute to the WTO's core functions under Article III of the WTO Agreement, namely:<sup>191</sup> (1) the facilitation of the implementation, administration, and operation of the WTO Agreement, the multilateral and plurilateral trade agreements; (2) providing the forum for negotiations of new agreements among its Members concerning their multilateral trade relations; (3) administer the Dispute Settlement Understanding (DSU); (4) administer the Trade Policy Review Mechanism (TPRM); and (5) coordinate with other global economic institutions such as the International Monetary Fund, the World Bank, and affiliated agencies. Nothing within this spectrum of functions, on its face, is itself prohibitive to the consideration of the public interest or human rights by the Member States. Implementation of the WTO Agreements and other multilateral or plurilateral agreements calls for "further legislative or regulatory action—on the national or international level—which is necessary to give practical effect to WTO obligations."<sup>192</sup> Inimitably, States advocating increased regulatory freedom to pursue public interest or human rights concerns through measures otherwise deemed restrictive of trade may articulate the matter within any of the foregoing functions of the member-driven WTO, either through its participation in the political processes of the WTO organs and bureaucracy, or through the legal and adjudicatory processes of the dispute settlement system.

Article IV of the WTO Agreement outlines the institutional structure of the WTO and its key political organs: the Ministerial Conference (composed of all Member States meeting at least once every two years); the General Council, which conducts the day to day functions of the Ministerial Conference when the latter is not in session, and also acts as the Trade Policy Review Body (TPRB) and the Dispute Settlement Body (DSB); the three sectoral councils (Council for Trade in Goods, Council for Trade in Services, and Council for TRIPS) which oversee

---

190. See Caroline Dommen, *Raising Human Rights Concerns in the World Trade Organization: Actors, Processes, and Possible Strategies*, 24 HUM. RTS. Q. 1, 49–50 (2002). Susan Ariel Aaronson has estimated that about 75% of the world's governments now participate in preferential trade agreements (facilitated under the WTO) that contain human rights provisions. Susan Ariel Aaronson, *Human Rights, in PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT: A HANDBOOK* 443, 443 (Jean-Pierre Chauffour & Jean-Christophe Maur eds., 2011).

191. Agreement Establishing the World Trade Organization art. III, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

192. Armin von Bogdandy & Markus Wagner, *Article III WTO Agreement: Functions of the WTO*, in *WTO: INSTITUTIONS AND DISPUTE SETTLEMENT* 28, 31 (Rüdiger Wolfrum, Peter-Tobias Stoll & Karen Kaiser eds., 2006).

the implementation of the GATT, GATS, and TRIPS; and other specialized councils, committees, and groups as created by the Ministerial Conference (such as the Trade Negotiations Committee, Committee on Trade and Development).<sup>193</sup> The WTO Secretariat discharges “exclusively international” responsibilities and administrative duties to implement instructions solely from the WTO.<sup>194</sup>

Various issues have been mediated and debated within this framework in regard to States’ regulatory freedom to pursue trade-restrictive measures due to human rights considerations,<sup>195</sup> spanning issues such as economic embargoes or sanctions against States committing egregious human rights violations,<sup>196</sup> process and production mechanisms (PPMs) which seek to restrict or ban trade of goods that have been manufactured or produced through human rights violations,<sup>197</sup> voluntary and mandatory labeling schemes disclosing social or environmental processes or inputs used for production,<sup>198</sup> among others. In 2007, Susan Ariel Aaronson observed that the contemporary political processes of negotiations, trade policy reviews, and WTO waiver decisions and Ministerial Conference discussions and practices already reflect the reality that “WTO members increasingly seek to reconcile their trade and human rights objectives.”<sup>199</sup> Her survey of years of WTO practices significantly revealed that: (1) accession applications frequently include questions on rule of law and the compliance with human rights by the applicant States;<sup>200</sup> (2) the WTO had already issued its first waiver specifically to protect human rights

---

193. Marrakesh Agreement, *supra* note 191, art. IV.

194. *Id.* art. VI.

195. *See generally* CASSIMATIS, *supra* note 55, at 289.

196. *See* Buhm-Suk Baek, *Economic Sanctions Against Human Rights Violations* (Cornell Law School Inter-University Graduate Student Conference, Paper No. 11, 2008), [http://scholarship.law.cornell.edu/lps\\_clacp/11](http://scholarship.law.cornell.edu/lps_clacp/11) (arguing that economic sanctions can be an effective enforcement tool to stop human rights violations in third States); *see* Daniel Halberstam & Eric Stein, *The United Nations, The European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 COMMON MKT. L. REV. 13 (2009) (arguing that the legality of UNSC economic sanctions—particularly their compatibility with international human rights—can still be determined by regional courts and international tribunals); *see* Michael Ewing-Chow, *First Do No Harm: Myanmar Trade Sanctions and Human Rights*, 5 NW. U. J. INT’L HUM. RTS. 153 (2007) (criticizing the general ineffectiveness of economic sanctions, while at the same time admitting the possibility of their limited or strategic use, so long as they do not contravene pre-existing WTO obligations).

197. *See* CHRISTIANE R. CONRAD, PROCESSES AND PRODUCTION METHODS (PPMs) IN WTO LAW: INTERFACING TRADE AND SOCIAL GOALS 20–30 (2011).

198. *See generally* Jessica M. Karbowski, *Grocery Store Activism: A WTO Compliant Means to Incentivize Social Responsibility*, 49 VA. J. INT’L L. 727 (2009); *see also* Carlos Lopez-Hurtado, *Social Labelling and WTO Law*, 5 J. INT’L ECON. L. 719 (2002).

199. Susan Ariel Aaronson, *Seeping in Slowly: How Human Rights Concerns are Penetrating the WTO*, 6 WORLD TRADE REV. 413, 415 (2007).

200. *Id.* at 424–26.

(e.g., the Kimberley Process Certification Scheme to prevent trading in conflict diamonds);<sup>201</sup> (3) human rights concerns were increasingly being litigated in the dispute settlement system through GATT Article XX exceptions;<sup>202</sup> (4) trade policy reviews conducted by the TPRB systematically engage questions of social and environmental impacts of, and human rights considerations in, Member States' trade policies;<sup>203</sup> and (5) trade negotiations under the Doha Round increasingly reflect the prioritization of human rights obligations as the premise of the global development agenda.<sup>204</sup> Other scholars confirm various aspects of this evolving phenomenon of accommodation and coordination of human rights in the political organs and processes of the WTO system.<sup>205</sup>

Perhaps the best indication of some institutional coordination of human rights and WTO law might stem from the General Council, which doubly acts as the Dispute Settlement Body (DSB) in adopting reports of dispute settlement panels and the Appellate Body.<sup>206</sup> One can plausibly expect that the increased DSU litigation of human rights and public interest concerns over the past decade has not only brought these issues to the forefront of awareness of the same representatives of the Member States in the General Council (who, in turn, act as the DSB as required under the DSU), but more to the point, that such *cyclical* referrals of Appellate Body interpretations of the GATT Article XX exceptions and other WTO law provisions that involve the issue of States' regulatory freedom to implement (ordinarily) trade-restrictive measures to protect human rights and public interest priorities, would also conceivably inform the Council's political decision-making in light of the ongoing jurisprudential precedents crystallizing from the dispute settlement system.<sup>207</sup> The DSB does not only adopt panel and Appellate

---

201. *Id.* at 428. Note that another well-known WTO waiver was issued to enable access to essential medicines by suspending patent protections under TRIPS. Decision of the General Council, *supra* note 61.

202. Aaronson, *supra* note 199, at 430–31.

203. *Id.* at 434–38.

204. *Id.* at 442–44.

205. Christopher Butler, Comment, *Human Rights and the World Trade Organization: The Right to Essential Medicines and the TRIPS Agreement*, U. PA. J. INT'L L. & POL'Y, 2007, at 1, 1–2; Abadir M. Ibrahim, *International Trade and Human Rights: An Unfinished Debate*, 14 GER. L.J. 321, 334–36 (2013); see Marie-Claire Cordonier Segger, *Effective Implementation of Intersecting Public International Law Regimes: Environment, Development, and Trade Law*, in PUBLIC INTEREST RULES OF INTERNATIONAL LAW: TOWARDS EFFECTIVE IMPLEMENTATION 213, 231–47 (Teruo Komori & Karel Wellens eds., 2009).

206. On the multi-functional nature of the General Council, see VAN DEN BOSSCHE, *supra* note 73, at 235–38.

207. See Barbara Marchetti, *The WTO Dispute Settlement System: Administration, Court, or Tertium Genus?*, 32 SUFFOLK TRANSNAT'L L. REV. 567, 572–73 (2009) (“The Dispute Settlement Body (DSB) plays a crucial role in the decision-making process of both the panel and the Appellate Body. This body is nothing more than the General Council in a different guise.

Body reports, but is also tasked to maintain surveillance of the implementation of rulings and recommendations, authorize suspension of concessions and other obligations under the WTO covered agreements, and inform the relevant WTO Councils and Committees of related developments arising from disputes under the WTO-covered agreements.<sup>208</sup> It is precisely due to these broad powers that the DSB is widely known to be “a political institution”<sup>209</sup> that has demonstrated a generally positive and successful ability to ensure Member States’ compliance with WTO dispute settlement rulings.<sup>210</sup>

Moreover, it must also be emphasized that the WTO Appellate Body apprehends a deep, but also careful sense of its unique judicial function and influential constitutive role within the WTO system.<sup>211</sup> In practice, the Appellate Body has been able to look to the practice of other courts and tribunals in the course of its own interpretation of trade standards only because its mandate and the relative porousness of the applicable procedural law in particular cases enabled it to do so.<sup>212</sup> The distinction

---

Beyond its panel establishing power, it has the authority to adopt and supervise the panel’s decisions and recommendations, and to authorize the suspension of concessions and other obligations of the WTO. In this way, the dispute resolution taken by the adjudicatory bodies, temporarily excluded from the Members negotiation circuit and given to third and neutral judicial bodies, comes back to the decision-making power of the contracting parties.”). Holger Hestermeyer has analyzed the possibilities for deploying the legal argument on the right to health and the right of access to medicines through the WTO dispute settlement mechanism, along with the political developments that culminated with the decision to amend the TRIPS agreement to enable access to essential medicines through compulsory licensing. *See generally* HOLGER HESTERMEYER, *HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES* (2007).

208. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 2(1)–2(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

209. Karen Kaiser, *Article 2 DSU: Administration*, in *WTO: INSTITUTIONS AND DISPUTE SETTLEMENT* 277, 279 (Rüdiger Wolfrum, Peter-Tobias Stoll & Karen Kaiser eds., 2006).

210. *See generally* Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 J. INT’L ECON. L. 397 (2007).

211. *See* Peter van den Bossche, *From Afterthought to Centerpiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System* 37 (Maastricht Fac. L., Working Paper No. 2005/1, 2005), <http://www.worldtradelaw.net/articles/vandenbosscheab.pdf>; Mitsuo Matsushita, *The Dispute Settlement Mechanism at the WTO: The Appellate Body – Assessment and Problems*, in *OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION* 507, 530 (Amrita Narlikar et al. eds., 2012).

212. VAN DAMME, *supra* note 16, at 163, 209–10.

Understanding the judicial function of Appellate Body Members means appreciating that the DSU and other procedural rules developed in the WTO may not be the only sources of their powers. International procedural law may provide other powers or restrict the exercise of existing ones . . . . The Appellate Body is amenable to such principles in the absence of any (contrary) rules in the DSU and its Working Procedures, and any contrary will of the

of its role within the WTO system is such that the Appellate Body's interpretations are deemed to

effectively allocate decision-making authority to market mechanisms, to political or administrative processes at the national or international levels, or to itself . . . [when it] must determine the amount of deference to show to national and local regulations that affect foreigners . . . it shapes the operation of [] second-order governance mechanisms.<sup>213</sup>

It is thus impossible to discount the normative pull that Appellate Body decisions on GATT Article XX have had on the WTO political organs' understanding and engagement of human rights in WTO law and governance.<sup>214</sup> WTO legalism, at least in this sense, inevitably influences the future course of WTO politics and policy-making.

Finally, one cannot overlook a key democratizing feature of the WTO, which is the consultative facility made for intergovernmental and non-governmental organizations (NGOs) to engage with the WTO under Article V of the WTO Agreement.<sup>215</sup> Despite recurring criticisms

---

disputants. General principles of procedural law, if proven to exist, apply if there are no more specific WTO rules. When deciding that such principles exist and apply, the Appellate Body often does not justify their application on the basis of principles of treaty interpretation. It becomes a matter of the applicable law, not of treaty interpretation. The creative function of the Appellate Body then lies in the expansion of the mandate to apply only WTO law, whether procedural or substantive, and less in the norm-creating function as such . . . . The assertion and exercise of inherent powers is illustrative of this maturing but equally self-enforces the Appellate Body's early decision to function as a court or tribunal. That decision was not inevitable, but perhaps its consequences were. In part, the evolution of procedural law in the WTO is the result of a dialectic relationship between consent-based powers and inherent powers. Increasingly, the consent of parties forces the Appellate Body to source procedural powers from outside the DSU and on an ad hoc basis, and to look at the practice of other courts and tribunals.

*Id.*

213. Gregory Shaffer, *Power, Governance, and the WTO: A Comparative Institutional Approach*, in *POWER IN GLOBAL GOVERNANCE* 130, 140 (Michael Barnett & Raymond Duval eds., 2004); see also Sol Picciotto, *The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance* (U.C. London Sch. Pub. Pol'y, Working Paper No. 14, 2005), <http://www.ucl.ac.uk/spp/publications/downloads/spp-wp-14.pdf>.

214. See Ingo Venzke, *Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*, in *INTERNATIONAL JUDICIAL LAWMAKING*, *supra* note 27, at 179, 213–14; see generally Adrian T.L. Chua, *Precedent and Principles of WTO Panel Jurisprudence*, 16 *BERKELEY J. INT'L L.* 171 (1998); see generally John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'?*, 98 *AM. J. INT'L L.* 109 (2004).

215. Article V of the Agreement states: "1. The General Council shall make appropriate

of the width of (and the perceived democratic deficit in) NGO participation in WTO processes and policy-making,<sup>216</sup> it remains an undeniable fact that NGOs have been able to strategically engage the WTO throughout various areas of trade policy-making and agenda-setting.<sup>217</sup> NGOs are able to observe plenary sessions and ministerial conferences, obtain information (albeit under certain limits) on trade issues under consideration at the WTO, and have been able to influentially debate and strategically push their particular advocacies on WTO Member States, such as those on enforcing labor rights, protecting the right to health and enabling access to essential medicines through compulsory licensing as an exception to TRIPS obligations.<sup>218</sup>

It is through this complex dynamic of formal institutions vested with broad global governance powers, generally centralized adjudication under a unique judicial function with constitutive and systemic impacts, and regular State and non-State actor involvement in trade policy and interpretation that one can appreciate the coordination of the trade-human rights dialectic within the WTO system. While one can easily critique the quality or success of this dialogue depending on one's perspective on WTO history, there are at least entrenched and embedded formal and informal mechanisms for ensuring interpretive continuity and the repeated public auditing of the issue of States' regulatory freedom to pursue trade-restrictive measures to fulfill human rights obligations or public interest concerns. As will be shown in the next section, the authoritative decision-making processes and actors in the international investment system nowhere approximate this dynamic.

---

arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO. 2. The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO." Marrakesh Agreement, *supra* note 191, art. 5.

216. See Mark Mattner, *Understanding NGO Participation in the WTO: History, Nature, and Implications for Developing Countries*, 2003 TRANSNAT'L ASS'N 132, 138–40.

217. Seema Sapra, *The WTO System of Trade Governance: The Stale NGO Debate and the Appropriate Role for Non-State Actors*, 11 OR. REV. INT'L L. 71, 105 (2009) ("NGOs already play an important role informally and have a significant agenda-setting impact . . . Now that NGOs are already actively involved in trade negotiations, the more important question might no longer be whether NGOs should participate, but what influence do NGOs have and how is it being exercised."); Julio A. Lacarte, *Transparency, Public Debate and Participation by NGOs in the WTO: A WTO Perspective*, 7 J. INT'L ECON. L. 683, 685 (2004); Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 433, 451–52 (1998); see generally Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996); see generally Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L ECON. L. 123, 128–43 (1998).

218. See Shamima Ahmed, *The Impact of NGOs on International Organizations: Complexities and Considerations*, 36 BROOK. J. INT'L L. 817, 827–28 (2010).



## 2. Investment Law

Investment treaty negotiations, compliance monitoring, and interpretation of IIA standards are not, by any means, institutionally or formally centralized. To reiterate, States have, for the most part, historically concluded their own investment treaty programs independently and usually without having to follow the route of multilateral negotiations.<sup>219</sup> As discussed in Part II.A.2, IIA standards reflect considerable textual diversity, albeit tending to contain common legal standards of protection and dispute settlement provisions that enable investors to directly sue host States for IIA breaches.<sup>220</sup> Because each IIA must be taken according to its own terms, it is difficult to generalize that IIAs all possess identical institutional or structural features for monitoring IIA compliance, establishing recourse to dispute settlement procedures, or standardizing IIA interpretations of States' spaces of regulatory freedom<sup>221</sup> between arbitral tribunals in investor-State arbitration and the actual States Parties to the IIAs.

Unlike the coordinative processes between political and legal organs of the WTO, there are no formal institutions in international investment law that could centralize and coordinate foreign investment policy-making undertaken by all States, with the IIA interpretations emerging from a constantly growing corpus of investor-State arbitral jurisprudence. While investment arbitral tribunals usually observe a sense of precedent,<sup>222</sup> this is not formally required of them within the

219. See, e.g., Investment Agreement for the COMESA Common Investment Area, May 23, 2007, 33 I.L.M. 1067; North American Free Trade Agreement, ch. 11, Dec. 17, 1992, 32 I.L.M. 289; The Dominican Republic – United States – Central America Free Trade Agreement, ch. 10, Aug. 5, 2004, 119 Stat. 462; ACIA, *supra* note 157; see generally Alireza Falsafi, *Regional Trade and Investment Agreements: Liberalizing Investment in a Preferential Climate*, 36 SYRACUSE J. OF INT'L L. & COMM. 43 (2008).

220. Stephan Schill has long demonstrated the emergence of a “multilateralized” system from the universe of bilateral treaties. Stephan W. Schill, *The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds*, 2 TRADE L. & DEV. 59, 61 (2010).

221. On vast literature involving the question of investment arbitral tribunals' degree of deference to domestic judicial review findings, see generally Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor State Arbitration*, 15 J. INT'L ECON. L. 223 (2012); Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of New Public Law Approach*, 52 VA. J. INT'L L. 57 (2011); William Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283 (2010); Rahim Moloo & Justin Jacinto, *Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law*, Y.B. INT'L INV. L. & POL'Y 2011–2012 ch.13 (Karl P. Sauvant ed., forthcoming 2014).

222. Schill, *supra* note 221, at 79–83; see also August Reinisch, *The Role of Precedent in ICSID Arbitration*, 2008 AUSTRIAN ARBITRATION Y.B. 495, 497–98; W. Mark C. Weidemaier,

terms of their arbitral function or mandate. The consent of the disputing parties—a foreign investor and the host State—determines and shapes the jurisdiction of the investment arbitral tribunal.<sup>223</sup> In the particular case of arbitration administered through the 1965 Convention on the Settlement of Investments Disputes Between States and Nationals of Other States (otherwise known as the ICSID Convention),<sup>224</sup> the jurisdiction of the arbitral tribunal depends upon the fulfillment of the requirements in Article 25 of the ICSID Convention—written consent, either through direct agreement of the parties, national legislation of the host State that enables investor recourse to ICSID arbitration, or an IIA between the host State and the investor's State of nationality that provides for consent to ICSID jurisdiction.<sup>225</sup>

Unlike the extended litigation procedures in the WTO, there is no counterpart standing body (like the Dispute Settlement Body) that ensures the enforcement of ICSID arbitral awards. While the ICSID Convention makes it obligatory for all States Parties to the ICSID Convention recognize and enforce ICSID awards,<sup>226</sup> there is no international body or organ that oversees the practical procedures for enforcement of ICSID awards—rather, as with the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards,<sup>227</sup> it is the party seeking enforcement that must submit the ICSID award to the local court or authority charged with enforcement of ICSID awards in the State concerned.<sup>228</sup> Excluding Argentina's particular circumstances and its current policy of non-payment in around forty pending or concluded arbitrations,<sup>229</sup> enforcement of ICSID awards has been reported to be fairly successful.<sup>230</sup>

---

*Toward A Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1914–16 (2010).

223. On the primary principle of consent in international arbitration, see Weidemaier, *supra* note 222, at 1907.

224. See generally CHRISTOPH SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* (2009) [hereinafter ICSID COMMENTARY].

225. ICSID Convention, *supra* note 181, art. 25. See also Christoph Schreuer, *ICSID: Consent to Arbitration*, PROJECT ON DISPUTE SETTLEMENT IN INTERNATIONAL TRADE, INVESTMENT AND INTELLECTUAL PROPERTY (Mar. 11, 2003), <http://unctad.org/en/Pages/DITC/DisputeSettlement/Project-on-Dispute-Settlement-in-International-Trade,-Investment-and-Intell-actual-Property.aspx?Pu=21,5>.

226. ICSID Convention, *supra* note 181, art. 54.

227. U.N. Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958.

228. Note that initiating the investment arbitration through ICSID (as opposed to ad hoc arbitration under UNCITRAL arbitration rules), has been observed by some as *not* necessarily a predictive indicator of future enforcement success. See Freya Baetens, *Enforcement of Arbitral Awards: 'To ICSID or not to ICSID' is NOT the Question*, in *THE FUTURE OF ICSID*, JURIS ARBITRATION SERIES, 211, 212 (Todd Weiler & Ian Laird eds., 2013).

229. *Id.* at 214–15.

230. Antonio R. Parra, *The Enforcement of ICSID Arbitral Awards*, in *ENFORCEMENT OF*

Ongoing developments, nevertheless, do show that States are increasingly trying to address the issue of their regulatory freedom to pursue public interest or human rights concerns through a variety of structural approaches in their IIAs, such as: (1) ad hoc joint decision mechanisms; (2) treaty-based institutional commissions; (3) inter-State consultative mechanisms; (4) incorporation of other subject matter-specific treaties (e.g., environmental, labor, human rights); and (5) inter-State bilateral appellate mechanisms to review arbitral awards under the IIA's investor-State dispute settlement mechanism, or the outright omission of investor-State dispute settlement mechanisms under the IIA.<sup>231</sup> The ad hoc joint decision mechanism is a relatively recent device in the newer generations of IIAs, and it may be utilized in the future to enable States to control the interpretation of an IIA so that States continue to retain sufficient policy flexibility to respond to domestic public interest and regulatory objectives.<sup>232</sup> As seen from Article 30(3) of the U.S. Model Bilateral Investment Treaty (BIT),<sup>233</sup> States Parties to an IIA reserve the right to issue a "joint decision" declaring their interpretation of any provision of the IIA, which would be binding on any present or future arbitral tribunal constituted under the IIA's dispute settlement mechanism. The States Parties may issue the joint decision interpreting an IIA standard (such as, for example, the fair and equitable treatment standard) at any stage, with or without reference to pending investor-State disputes, and with or without reference to contemporaneous interpretations by other international tribunals of the same IIA standard contained in other IIAs. Other joint decision mechanisms are present in Article 30(3) of the 2005 United States-Uruguay BIT,<sup>234</sup> Article 30(3) of the 2008 United States-Rwanda

---

ARBITRAL AWARDS AGAINST SOVEREIGNS, 131, 136 (R. Doak Bishop ed., 2009).

231. For a recent general survey on approaches for States to control the interpretation of their IIAs, see United Nations Conference on Trade and Development (UNCTAD), *Interpretation of IIAs: What States Can Do*, IIA Issues Note No. 3, 1, 5–8 (Dec. 2011), available at [http://unctad.org/en/Docs/webdiaeia2011d10\\_en.pdf](http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf).

232. See Diane A. Desierto, *Joint Decisions by States Parties: Fair Control of Tribunal Interpretations?*, KLUWER ARBITRATION BLOG (June 8, 2012), <http://kluerarbitrationblog.com/blog/2012/06/08/joint-decisions-by-state-parties-fair-control-of-tribunal-interpretations/>.

233. Article 30(3) of the U.S. Model BIT states: "A joint decision of the Parties, each acting through its representative designated for the purpose of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision." United States Model BIT, U.S.-(X), art. 30(3), 2012, available at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

234. Article 30(3): "A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision." Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru.,

BIT,<sup>235</sup> Article 29(2) in relation to Article 18(2) of the 2007 India-Mexico BIT,<sup>236</sup> Article X(6) of the 2009 Canada-Czech Republic BIT,<sup>237</sup> Article 27(3) of Chapter 11 (Investment) of the 2010 ASEAN-Australia-New Zealand Free Trade Agreement.<sup>238</sup>

While these mechanisms openly permit States Parties to the IIA to agree on any interpretation of IIA provisions that would prevail over any arbitral tribunal, they problematically do not refer to international law as the Parties' guiding principles when deciding on any future agreed interpretation of the IIA. Neither do the joint decision mechanisms provide for any internal control or guidance for the States Parties when their interpretation frontally collides with an arbitral tribunal's legal interpretation of an IIA standard, issued by arbitrators in observance of their fundamental duties to maintain independence and impartiality. There has not yet been an occasion to resolve the potential jurisdictional tension between arbitral tribunals' exercise of their competences to interpret and apply the IIA to concrete investor-State disputes, and how States Parties to the IIA might strategically wield the joint decision mechanism to minimize or avoid liability under the IIA

---

art. 30(3), Nov. 4, 2005, S. TREATY DOC. NO. 109-9 [hereinafter United States/Uruguay BIT].

235. Article 30(3): "A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision." Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Rwanda, art. 30(3), Feb. 19, 2008, S. TREATY DOC. NO. 110-23.

236. Article 29(2):

The Contracting Parties agree to consult each other on having a joint interpretation on Article 7 [Expropriation] in accordance with paragraph 2 of Article 18 ["An interpretation jointly formulated and agreed upon by the Contracting Parties with regard to any provision of this Agreement shall be binding on any tribunal established under this Section."] of this Agreement at any time after the entry into force of this Agreement.

Agreement Between the Government of the United Mexican States and the Government of the Republic of India on the Promotion and Protection of Investments, Mex.-India, art. 29(2), May 21, 2007, *available at* <http://www.unctadxi.org/templates/DocSearch.aspx?id=779>.

237. Article X(6): "An interpretation of this Agreement agreed between the Contracting Parties shall be binding on a Tribunal established under this Article." Agreement between the Government of Canada and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments, Can.-Czech, art. X(6), Nov. 15, 1990, *available at* [http://www.sice.oas.org/Investment/BITSbyCountry/BITs/CAN\\_Czech\\_Ad\\_e.asp](http://www.sice.oas.org/Investment/BITSbyCountry/BITs/CAN_Czech_Ad_e.asp).

238. Article 27(3) of Chapter 11: "A joint decision of the Parties, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision." Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, art. 27(3), Feb. 29, 2009, *available at* <http://www.asean.fta.govt.nz/assets/Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area.pdf>.

by controlling the latter's ultimate interpretation at any stage of a given investor-State dispute.

Treaty-based institutional commissions or inter-State consultative bodies, on the other hand, pose less of a danger of undue interference with arbitral tribunals' competences in specific pending investor-State disputes. While the IIA interpretations of treaty-based commissions are generally binding on arbitral tribunals, they are nevertheless issued presumably with a more institutional view of the interpretation's consequences for the future implementation, oversight, and supervision of the IIA. A treaty-based institutional commission also has the advantage of entrenching regular consultations and dialogue between the States Parties to the IIA, and thus may be said to have a more long-term view of the IIA's implementation when it issues an interpretation, as opposed to an ad hoc joint decision mechanism which may be triggered purposely only to affect the outcome of specific pending investor-State disputes. One example of such a treaty-based institutional commission is the North American Free Trade Agreement (NAFTA) Free Trade Commission,<sup>239</sup> which was set up as an institution composed of cabinet-level representatives from the three contracting States, with the specific powers to "supervise the implementation" of the treaty,<sup>240</sup> "oversee its further elaboration,"<sup>241</sup> and "resolve disputes that may arise regarding its interpretation or application."<sup>242</sup> The Free Trade Commission issued Notes of Interpretation in 2001,<sup>243</sup> although admittedly it has since been criticized for the seeming *de facto* amendment of NAFTA treaty provisions as a result of the Notes.<sup>244</sup> Other IIAs that establish institutional commissions authorized to undertake IIA interpretation binding upon future arbitral tribunals include: Article 10.22(3) of the 2004 Dominican-Republic-Central America-United States Free Trade Agreement (DR-CAFTA),<sup>245</sup> Article 40(3) of the 2006 Canada/Peru BIT,<sup>246</sup> Article 40(2) of the 2009

---

239. North American Free Trade Agreement (NAFTA), art. 2001 (The Free Trade Commission), Dec. 17, 1992, IC-MT 002; see also Jeswald Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 456 (2010).

240. NAFTA, *supra* note 238, art. 2001(2)(a).

241. *Id.* art. 2001(2)(b).

242. *Id.* art. 2001(2)(c).

243. See NAFTA: Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA FREE TRADE COMMISSION, July 31, 2001, [http://www.sice.oas.org/tpd/nafta/Commission/CH11\\_understanding\\_e.asp](http://www.sice.oas.org/tpd/nafta/Commission/CH11_understanding_e.asp).

244. See Charles N. Brower, *NAFTA's Investment Chapter: Dynamic Laboratory, Failed Experiments, and Lessons for the FTAA*, 97 AM. SOC'Y INT'L L. PROC. 251, 255-57 (2003).

245. Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA 2004), art. 10.22, Aug. 5, 2004, IC-MT 012.

246. Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments, Can.-Peru., art. 40(3), Nov. 14, 2006, IC-BT 014.

Canada/Jordan BIT,<sup>247</sup> and Article X(6) of the 2010 Canada/Slovakia BIT.<sup>248</sup>

In contrast to ad hoc joint decision mechanisms and treaty-based institutional commissions, inter-State consultation mechanisms in an IIA have the least potential for disrupting arbitral independence and impartiality in handling investor-State disputes. They are not likely to affect the substantive content of an IIA, but rather, could serve as a structural device to facilitate continuing communications between States Parties to the IIA. This structural device could be particularly useful for States Parties to transparently articulate and make of record any ongoing regulatory and public interest concerns that could affect the future implementation of the IIA. Examples of these include Article 12 of the 1996 Greece/Chile BIT,<sup>249</sup> Article 12 of the 1989 Netherlands/Ghana BIT,<sup>250</sup> Article VIII of the 1993 Spain/Philippines BIT,<sup>251</sup> Article XI of the 1997 Denmark/Philippines BIT,<sup>252</sup> Article 43 of the 2009 ASEAN Comprehensive Investment Agreement,<sup>253</sup> Article VIII of the 1995 Czech Republic/Philippines BIT,<sup>254</sup> Article 8 of the 1985 Netherlands/Philippines BIT,<sup>255</sup> Article VIII of the 1999 Philippines/Pakistan BIT,<sup>256</sup> Article 7 of the 1997 Germany/Philippines BIT,<sup>257</sup> and Article 29(1) of the 2007 India/Mexico BIT.<sup>258</sup>

---

247. Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments, Can.-Jordan, art. 40(2), June 28, 2009, IC-BT 1154.

248. Agreement Between Canada and the Slovak Republic for the Promotion and Protection of Investments, Can.-Slovk., art. X(6), July 20, 2010, IC-BT 1533.

249. Agreement Between the Government of the Republic of Chile and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, Chile-Greece, art. 12, July 10, 1996, IC-BT 1475.

250. Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Ghana, Neth.-Ghana, art. 12, Mar. 31, 1989, IC-BT 938.

251. Agreement on the Reciprocal Promotion and Protection of Investments between the Republic of the Philippines and the Kingdom of Spain, Phil.-Spain, art. VIII, Oct. 19, 1993, 1842 U.N.T.S. 91, IC-BT 1369.

252. Agreement Between the Government of the Republic of the Philippines and the Government of the Kingdom of Denmark Regarding the Promotion and Reciprocal Protection of Investments, Phil.-Den., art. XI, Sep. 26, 1997, IC-BT 893.

253. ACIA, *supra* note 157, art. 43.

254. Agreement Between the Republic of the Philippines and the Czech Republic for the Promotion and Reciprocal Protection of Investments, Phil.-Czech, art. VII, Apr. 5, 1995, IC-BT 592.

255. Agreement Between the Kingdom of the Netherlands and the Republic of the Philippines for the Promotion and Protection of Investments, Neth.-Phil., art. 8, Feb. 27, 1985.

256. Agreement Between the Government of the Republic of the Philippines and the Government of the Islamic Republic of Pakistan for the Promotion and Reciprocal Protection of Investment, Phil.-Pak., art. VIII, Apr. 23, 1999, IC-BT 668.

257. Agreement Between the Republic of the Philippines and the Federal Republic of Germany for the Promotion and Reciprocal Protection of Investments, Phil.-Ger., art. 7, Apr. 18,

Alternatively, some IIAs include language that purposely cross-references other treaty obligations involving social protection, human rights, or public interest objectives. Article 18(2) of the 2002 Austria/Malta BIT, for example, specifically provides that the application of the European Convention on Human Rights “shall not be excluded.”<sup>259</sup> Clause 1 of the Protocol to the 1998 Japan/Pakistan BIT prohibits the interpretation of the treaty in a way that would derogate from intellectual property rights agreements, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights, “and other treaties concluded under the auspices of the World Intellectual Property Organization.”<sup>260</sup> Article 5(3) of the 2004 Belgium-Luxembourg Economic Union/Serbia and Montenegro BIT reaffirms the States’ Parties “commitments under international environmental agreements.”<sup>261</sup> While Article 12 of the 2005 United States/Uruguay

---

1997, IC-BT 123.

258. Mexico/India BIT 2007, *supra* note 236, art. 29(1).

259. Article 18 (2): “The application of the European Convention on Human Rights shall not be excluded.” Agreement between the Republic of Austria and Malta on the Promotion and Mutual Protection of Investments (Austria/Malta BIT 2002), Austria-Malta, art. 18(2), May 29, 2002, IC-BT 1425.

260. Protocol, Clause 1:

Nothing in the Agreement shall be construed so as to derogate from the rights and obligations under international agreements in respect of protection of intellectual property rights to which they are parties, including Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of Marrakesh Agreement Establishing the World Trade Organization, and other treaties concluded under the auspices of the World Intellectual Property Organization.

Agreement between Japan and the Islamic Republic of Pakistan Concerning the Promotion and Protection of Investment, Japan-Pak., Protocol Clause 1, Mar. 10, 1998, IC-BT 655. *See also* Agreement between Japan and the People’s Republic of Bangladesh Concerning the Promotion and Protection of Investment (Japan/Bangladesh BIT 1998), Japan-Bangl., Protocol Clause 1, Nov. 10, 1998; Agreement between Japan and Mongolia Concerning the Promotion and Protection of Investment (Japan/Mongolia BIT 2001), Japan-Mong., Protocol Clause 1, Feb. 15, 2001; Agreement between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion and Protection of Investment, S. Kor.-Japan, Protocol Clause 1, Mar. 22, 2002.

261. Article 5(3): “The Contracting Parties reaffirm their commitments under the international environmental agreements, which they have accepted. They shall strive to ensure that such commitments are fully recognized and implemented by their national legislation.” Agreement between the Belgo-Luxembourg Economic Union, on the one hand, and Serbia and Montenegro, on the other hand, on the Reciprocal Promotion and Protection of Investments, Bel.-Lux.-Serb. & Mont., art. 5(3), Mar. 6, 2004. *See also* Agreement between the Belgian-Luxembourg Economic Union, on the one hand, and the Republic of the Sudan, on the other hand, on the Reciprocal Promotion and Protection; of Investments, Bel.-Lux.-Sudan, art. 5(3), Nov. 7, 2005; Agreement between the Belgian-Luxembourg Economic Union, on the one hand, and the Federal Democratic Republic of Ethiopia, on the other hand, on the Reciprocal

BIT holds that “it is inappropriate to encourage investment by weakening or reducing the protections afforded in *domestic* environmental laws,”<sup>262</sup> Articles 13(1) and 13(2) of the same treaty make references to “*internationally* recognized labor rights.”<sup>263</sup> Other IIAs tend to provide rules governing the application of other international agreements along with the IIA, usually calling for the application of the “more favorable” provision to the States Parties without indicating the criteria for determining the “favorability” of the applicable agreement. Examples of these types of references to the application of other treaties include: Article 11 of the 1993 Slovenia/Slovakia BIT,<sup>264</sup> Article 10 of the 1994 Hungary/Bulgaria BIT,<sup>265</sup> and Article 13(1) of the 1994 Czech Republic/United Arab

---

Promotion and Protection of Investments, Bel.-Lux.-Eth. art. 5(3), Oct. 26, 2006; Agreement between the Belgo-Luxembourg Economic Union and the Government of the Republic of Guatemala on the Reciprocal Promotion and Protection of Investments, Bel.-Lux.-Guat., art. 13(3), Apr. 14, 2005; Agreement between the Belgo-Luxembourg Economic Union, on the one hand, and the Great Socialist People’s Libyan Arab Jamahiriya, on the other hand, on the Reciprocal Promotion and Protection of Investments, Bel.-Lux.-Libya, art. 5(3), Feb. 15, 2004; Agreement between the Belgo-Luxembourg Economic Union and the Republic of Mauritius on the Reciprocal Promotion and Protection of Investments, Bel.-Lux.-Mauritius, art. 5(3), Nov. 30, 2005; Agreement between the Belgo-Luxembourg Economic Union, on the one hand, and the Government of the Republic of Peru, on the other hand, on the Reciprocal Promotion and Protection of Investments Bel.-Lux.-Peru, art. 5(3), Oct. 12, 2005.

262. United States/Uruguay BIT, *supra* note 234, art. 12(1).

263. *Id.* arts. 13(1), 13(2).

264. Agreement on Reciprocal Investment Protection and Promotion between the Republic of Slovenia and the Slovak Republic (Slovenia/Slovakia BIT 1993), IC-BT 1522 (1993), art. 13(1):

When any matter is treated simultaneously by this agreement and some other international agreements of which the two parties hereof are signatories, or the matter is governed by the general international law, then the most favourable provisions shall apply to both parties hereof and their respective investors, on a case-by-case basis.

*Id.*

265. Article 10:

Should national legislation of the Contracting Parties or present or future international agreements applicable between the Contracting Parties or other international agreements entered into by both Contracting Parties contain regulations, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable prevail over the present Agreement.

Agreement Between the Republic of Bulgaria and the Republic of Hungary on Mutual Promotion and Protection of Investments (Hungary/Bulgaria BIT 1994), Bulg.-Hung., art. 10, June 8, 1994. *See also* Agreement between the Czech Republic and the Republic of Bulgaria for



Emirates BIT.<sup>266</sup> Apart from these modes of referring to other applicable treaties, current IIAs seldom contain language that explicitly integrates international human rights treaties, environmental, or labor agreements as part of subsisting obligations to be observed alongside IIA obligations.

Finally, it should be stressed that the ICSID arbitration system does not contain any full-blown appeals procedure to review arbitral awards' factual and legal findings, instead providing for limited annulment procedures in Article 52 of the ICSID Convention.<sup>267</sup> States Parties tend to rely on the "self-contained"<sup>268</sup> dispute settlement system under the ICSID Convention, and thus rarely contemplate building any bilateral appellate mechanism into their IIAs. The 2005 United States/Uruguay BIT provided for the possibility of creating such a bilateral appellate mechanism,<sup>269</sup> but none of the other IIAs concluded by the United States contain such a provision. Unlike this unusual practice, IIAs would usually state that an arbitral award "shall not be subject to any appeal or remedy other than those provided for in [the ICSID] Convention."<sup>270</sup> In this sense, carving out a bilateral appellate

---

the Promotion and Reciprocal Protection of Investments (Czech Republic/Bulgaria BIT 1999), Czech-Bulg., art. 11, Mar. 17, 1999.

266. Article 13(1):

Where a matter is governed simultaneously both by this Agreement and by other international agreements to which both the Contracting States are parties or general principles of law commonly recognized by both Contracting States or domestic law of the host State, nothing in this Agreement shall prevent either Contracting State or any of its investors who own investments in the territory of the other contracting State from taking advantage of whichever rules are the more favourable to their case.

Agreement between the Government of the United Arab Emirates and the Government of the Czech Republic for the Promotion and Protection of Investments (Czech Republic/United Arab Emirates BIT 1994), U.A.E.-Czech, art. 13(1), Nov. 23, 1994.

267. See generally ICSID COMMENTARY, *supra* note 224, at 890–1095.

268. See Organisation for Economic Cooperation and Development (OECD), *Improving the System of Investor-State Dispute Settlement: An Overview*, 183, at 185 in OECD, INTERNATIONAL INVESTMENT PERSPECTIVES (2006 ed.), available at <http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/40079647.pdf>.

269. United States/Uruguay BIT, *supra* note 234, Annex E (Possibility of a Bilateral Appellate Mechanism): "Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism." *Id.*

270. See, e.g., Agreement between Federal Republic of Germany and the Republic of Indonesia concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Indon., art. 10(3), May 14, 2003; Agreement between the Kingdom of Saudi Arabia and the Belgo-Luxembourg Economic Union concerning the Reciprocal Promotion and Protection of Investments, Saudi Arabia-Belg.-Lux., art. 10(3)(b), Apr. 4, 2001; Agreement between the

mechanism from the investor-State dispute settlement mechanism under the IIA, well outside of the self-contained dispute settlement procedures in the ICSID system, problematically introduces more uncertainty over the future enforceability of arbitral awards issued under the IIA.<sup>271</sup> Nonetheless, a State may also choose to ensure that it has full policy flexibility by altogether omitting any provision that establishes an investor-State dispute settlement mechanism in the IIA. This structural omission insulates the host State from investors' direct recourse to investor-State arbitration, thereby diminishing the possibility that the host State could be held liable to pay compensation for IIA breaches against investors. Moreover, investors would be forced to seek legal remedies from local courts of the host State, or apply with their respective home States to exercise diplomatic protection over their claims. While removing the investor-State dispute settlement mechanism from an IIA would thus make it much easier for a host State to implement policy changes at its own wherewithal in the future, it would also correspondingly increase regulatory risks for foreign investors. This is best illustrated in the Australian Government's April 2011 announcement that it would reject any investor-State dispute settlement mechanism from its IIAs.<sup>272</sup>

As seen in the foregoing, the institutional limitations and diversity of IIA texts within the investment law system impedes coordinated law-making towards uniform interpretations of States' regulatory freedom to pursue human rights and public interest concerns, unlike in WTO law. Apart from being a matter of text and structure, I further submit that this is also an ontological issue involving competing ideologies unique to each treaty regime. In the following Part III, I present the ideological and thematic differences that have respectively arisen in WTO law and investment law on States' regulatory freedoms to pursue (ordinarily)

---

Government of the Kingdom of Denmark and the Government of the Republic of Zimbabwe concerning the Promotion and Reciprocal Protection of Investments, Den.-Zim., art. 9(3)(b), Oct. 25, 1996.

271. Other scholars have referred to the need for an authoritative centralized appellate mechanism that would generate consistent jurisprudence and avoid normative fragmentation. See Tomer Broude, *Principles of Normative Integration and the Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration*, 6 LOY. U. CHI. INT'L REV. 173, 180–81 (2008); Christian J. Tams, *An Appealing Option? The Debate About an ICSID Appellate Structure*, 57 ESSAYS IN TRANSNATIONAL ECONOMIC LAW 38–40 (2006), available at <http://www.telc.uni-halle.de/sites/default/files/altbestand/Heft57.pdf> (last accessed Jan. 10, 2013).

272. Kyla Tienhaara & Patricia Ranald, *Australia's Rejection of Investor-State Dispute Settlement: Four Potential Contributing Factors*, INVESTMENT TREATY NEWS- INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (July 12, 2011), available at <http://www.iisd.org/itn/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/>.

non-conforming or non-compliant measures within each regime to comply with human rights and public interest concerns. Using the “necessity” cases in GATT Article XX jurisprudence as an example, I show why the deeper ideological considerations of market access and trade policy adjustment in these particular cases additionally militate against simply transferring the “weighing and balancing” tests developed by the WTO panels and Appellate Body into the interpretation of “necessity” exceptions in investment treaties that have no traceable drafting history or linkage with GATT Article XX.

### III. TWO VISIONS OF REGULATORY FREEDOM TO ACHIEVE PUBLIC POLICY AND HUMAN RIGHTS OBJECTIVES

When a State asserts its regulatory freedom against international regulation or oversight, it is actually re-articulating Hans Kelsen’s classic problem on the sovereignty of the state: “the problem of the sovereignty of the national legal order in its relation to the international legal order.”<sup>273</sup> The seeming Gordian knot between national law and international law cannot be disentangled simply by arguing that one is superior to the other. What was more critical, in Kelsen’s view, was to appreciate the “difference of two systems of reference. One of them is firmly connected with the legal order of one’s own state or national legal order; the other is firmly connected with the international legal order. Both systems are equally correct and equally legitimate,”<sup>274</sup> and ultimately, it would be a matter of *policy* or “political considerations,”<sup>275</sup> rather than hard positivist legal science to assign priorities between one and the other. The same reasoning may be analogized in characterizing the issue of States’ regulatory freedom asserted in WTO law *vis-à-vis* international investment law. While States commonly seek to assert policy space and regulatory freedom in both treaty regimes, the assertions are addressed to different questions and frames of reference. The contours of States’ regulatory freedom and policy spaces that are accepted and understood in WTO law would thus very likely prove quite different from those sought in international investment law.

#### A. Clarifying Frames of Reference: WTO Law

Regulatory freedom in WTO law is addressed to issues of market access, non-discrimination, and the restoration of the economic equilibrium expected from trade liberalization commitments under the

---

273. Hans Kelsen, *Sovereignty and International Law*, 48 GEO. L.J. 627, 628 (1960).

274. *Id.* at 639.

275. *Id.* at 640.

WTO agreements.<sup>276</sup> WTO law purposely delineates between a State's justifiable exercise of regulatory freedom, from protectionist measures designed to circumvent commitments under the WTO Agreements. These trade agreements purposely accept that a margin of domestic regulatory freedom must continue to be maintained both as a matter of economic efficiency (assuming asymmetric information on world markets, technologies, consumer preferences, and all other exogenous factors that cannot be anticipated in designing the trade agreement), as well as to build in a "safety-valve" precaution against unforeseeable contingencies that could disrupt the anticipated or forecasted terms of trade.<sup>277</sup> The criteria for determining the lawfulness of the State's assertion of regulatory freedom, however, differs across the various provisions of the WTO covered agreements. The State's justifiable exercise of regulatory freedom could be manifested in different ways. It may be asserted to permit the State to implement an ordinarily trade-distorting or trade-restrictive non-conforming measure, in order to promote and advance specific public or non-trade aims accepted within the sphere of the agreements—such as the exceptions enumerated in GATT Article XX or GATS Article XIV.<sup>278</sup> Not every domestic regulatory measure of a State that might pose some obstacle to trade, however, will require legal justification: "Articles II, III, and XI . . . [of] the GATT restricts itself to establishing a non-discrimination regime for internal regulation and internal taxation, under which only *de jure* and *de facto* discriminatory measures need to be justified under pertinent GATT exceptions."<sup>279</sup>

Regulatory freedom may also be justifiably invoked to permit a State

---

276. Vranes, *supra* note 52, at 956–57,

Determining the GATT's impact on national regulatory autonomy, in particular, requires a legal analysis of two "triangular" relations' in the GATT agreement: regarding regulatory measures in general, the principal confines of national regulatory autonomy are demarcated by the triangle which consists of Article XI (General Elimination of Quantitative Restrictions), Article III (National Treatment), and Article XX (General Exceptions). As respects taxation, these borderlines are drawn by the triangular relationship between Articles II (concerned with further border measures, namely customs duties, and all other duties and charges "imposed on or in connection with importation"), Article III (National Treatment) and Article XX (General Exceptions).

*Id.*

277. See PETROS C. MAVROIDIS ET AL., *THE LAW AND ECONOMICS OF CONTINGENT PROTECTION IN THE WTO* 466–71 (2008).

278. See Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an 'Aim and Effects' Test*, 32 INT'L LAW 619, 621 (1998).

279. Vranes, *supra* note 52, at 962.

to recalibrate or reschedule performance of its trade liberalization commitments, when certain domestic constituencies or sectors cannot yet meet the terms of competition brought by opening up to foreign market access, or when the State's level of economic development itself requires a longer timeframe to comply with trade liberalization commitments. Examples of this may be gleaned from the emergency safeguards measures in GATT Article XIX, the Agreement on Safeguards, Article 5 of the Agreement on Agriculture, and Article 6 of the Agreement on Textiles and Clothing,<sup>280</sup> as well as various provisions on special and differentiated treatment for developing countries.<sup>281</sup> Finally, a State's regulatory freedom may justify it to monopolize regulatory oversight (or in some cases, directly supply) certain public goods according to its own legislative or political agenda, and in keeping with its own economic programming and social protection objectives,<sup>282</sup> such as GATS Article I:3(b) (which recognizes

---

280. See General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XIX, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (Emergency Action on Imports of Particular Products); see Agreement on Safeguards art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter Agreement on Safeguards].

[A] Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

*Id.*; Agreement on Agriculture art. 5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter Agreement on Agriculture] (Special Safeguard Provisions); Agreement on Textiles and Clothing art. 6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter Agreement on Textiles and Clothing] [see "transitional safeguards" in Article 6(1)].

281. On special and differential treatment (SDT) provisions, see Subsidies and Countervailing Measures (SCM) Agreement art. 27, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter SCM]; Agreement on Trade Related Aspects of Intellectual Property Rights arts. 65.2 & 65.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter TRIPS]; Agreement on Technical Barriers to Trade arts. 12.4, 12.6 & 12.8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter TBT]; The WTO Agreement on the Application of Sanitary and Phytosanitary Measures arts. 10.1, 10.2, 10.4 & 14, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter SPS]. See also Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, World Bank, Oct. 2004, available at <http://www.ycsg.yale.edu/focus/gta/operationalizing.pdf> (proposals for transparency and specificity of SDT provisions and monitoring mechanisms for SDT provisions).

282. Joel Trachtman & Gabrielle Marceau, *TBT, SPS, and GATT: A Map of the WTO Law on Domestic Regulation*, 36 J. WORLD TRADE 811 (2002).

“services supplied in the exercise of governmental authority”<sup>283</sup>) and Article 2.2 of the TBT Agreement (which acknowledges that technical regulations shall not be more trade-restrictive than necessary to fulfill certain “legitimate objectives,” such as national security requirements, prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment).

The inherent flexibility and accommodation built into the WTO agreements makes it clear that States already contemplate inevitable and continuing tensions between domestic regulations and legislation with their duties to fulfill all trade obligations under the WTO. This is evidenced by the particular text of the WTO agreements that purposely preserve State regulatory freedom for certain identified public policy or public interest areas and human rights concerns, as well as in the organic structure and competences of its interpretive institutions (e.g., the Appellate Body and the dispute settlement panels under the DSU). Ensuring the continued flexibility of the WTO Agreements toward delineating lawful exercises of State regulatory freedom, from covert or openly protectionist measures, is an interpretive function deliberately entrusted to the panels and the Appellate Body under the DSU. The breadth of their interpretive authority well explains how GATT jurisprudence has correspondingly “evolved” to “encompass protective discrimination” or “hidden discrimination” that would “represent an innocuous disparate impact on trade, unrelated to protection.”<sup>284</sup>

The “weighing and balancing” methodology of the Appellate Body and the dispute settlement panels axiomatically reflects both the functional mandates of these tribunals, as well as the fundamental flexibility explicitly maintained in the Agreements to uphold State regulatory freedoms exercised for public policy, public interest, or human rights objectives. Because not every internal regulation or domestic measure of a State that could have some possible or forecasted impact on trade automatically rises to the level of an unjustified trade distortion or trade restriction, it is understandable that the Appellate Body and the dispute settlement panels devised certain legal tests to differentiate purely protectionist discriminatory measures, from those that had the cloak of WTO protection for State regulatory freedom. It is further comprehensible that these legal tests would leave considerable margin of appreciation<sup>285</sup> for the design of a measure *vis-à-vis* proposed

---

283. On the lack of clarity or definition in regard to this standard, see Robert Howse & Elisabeth Tuerk, *The WTO Negotiations on Services: The Regulatory State up for Grabs*, 9 CANADA WATCH 1–2 (Sept. 2002).

284. Robert Howse & Elisabeth Tuerk, *The WTO Impact on Internal Regulations – A Case Study of the Canada-EC Asbestos Dispute*, in *TRADE AND HUMAN HEALTH AND SAFETY* 77–117 (George A. Bermann & Petros C. Mavroidis eds., 2006).

285. MATTHIAS OESCH, STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION 14 (2003)

reasonable alternative measures. This uniquely-textured standard of review of the Appellate Body and the dispute settlement panels is a particular “procedural instrument and, *in addition to* substantive treaty rules and other procedural techniques developed by panels and the Appellate Body, shapes the jurisdictional competence of the WTO adjudicating bodies vis-à-vis WTO members.”<sup>286</sup>

The fact-intensive and context-specific “weighing and balancing” methodology of the Appellate Body and the dispute settlement panels also enables the management and allocation of the burden of proof, when either tribunal has to compare a challenged State measure with other possible (or less trade-distorting) alternatives.<sup>287</sup> More to the point, this method is entirely appropriate to the internal design logic underlying the remedies system of the DSU, where directing the violating Member State to bring its measure “in conformity” with the Agreements is the “ultimate remedy.”<sup>288</sup> The remedy prescribed under the DSU for a State’s domestic measures that distort the achievement of the ideal general economic equilibrium<sup>289</sup> in fully liberalized international trade<sup>290</sup> is to adjust that State’s policies in a manner that would correct the trade distortion. To this end, the panel or the Appellate Body issues a recommendation “that the Member concerned bring the measure into conformity with that agreement,” and may additionally “suggest ways in which the Member concerned could implement the recommendations.”<sup>291</sup> As stressed by the Panel in *United States – Section 301 Trade Act*,<sup>292</sup> however, there could be any number of ways, short of or apart from changing an offending domestic statute, to remove the trade-distorting effect of the inconsistency between the challenged State measure and the State’s WTO obligations.<sup>293</sup> After adoption of the panel or Appellate Body report, the DSB then oversees

---

(“the notion of standard of review defines the *margin of appreciation* which panels and the Appellate Body grant national authorities in enacting and enforcing their obligations under the WTO agreements. Panels respect this margin before they are prepared to declare a national measure inconsistent with WTO law . . .”).

286. *Id.*

287. See MICHELLE T. GRANDO, EVIDENCE, PROOF, AND FACT-FINDING IN WTO DISPUTE SETTLEMENT 212–15 (2009).

288. R. RAJESH BABU, REMEDIES UNDER THE WTO LEGAL SYSTEM 136 (2012).

289. JACOB L. MOSAK, GENERAL EQUILIBRIUM THEORY IN INTERNATIONAL TRADE 180 (1944).

290. See Donald R. Davis & David E. Weinstein, *International Trade as an ‘Integrated Equilibrium’: New Perspectives*, 90 EMPIRICAL TESTING OF TRADE THEORIES: AEA PAPERS AND PROCEEDINGS 2, 150–54. (2000).

291. DSU art. 19.1.

292. Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999).

293. *Id.* ¶¶ 7.101–7.104.

compliance (or keeps “surveillance”<sup>294</sup>) by the Member State concerned with its recommendation and ruling, either through withdrawal or modification of the challenged measure.<sup>295</sup> It is only when a Member State fails to comply with the recommendation or ruling that the complaining State could either initiate negotiations to obtain compensation from the non-complying State,<sup>296</sup> or impose countermeasures through discriminatory suspension of WTO concessions.<sup>297</sup>

This is precisely why Appellate Body and dispute settlement panels could afford to interpret the GATT Article XX “necessity” provisions using a “least restrictive means” test.<sup>298</sup> By the time the tribunal undertakes a detailed analysis of the asserted GATT Article XX justification, it has already reached a preliminary conclusion that the State’s challenged measure is already inconsistent or non-conforming with GATT obligations, and the respondent State’s challenged measure must thus be adjusted or reformed to bring it into GATT compliance. At that point, then, the respondent State assumes the burden of proving—after the complaining Member State shows that a “reasonably available” alternative exists—that the challenged measure was the “least restrictive means” employed to accomplish the public interest objective specified in the GATT Article XX justification.

Andrew Mitchell and Caroline Henckels have argued that the above method of reasoning “might well improve the decision making process of investment tribunals.”<sup>299</sup> However, they also (rightly) concede that the WTO jurisprudence on “necessity” tests are laden with numerous ambiguities: (1) “the role of the assessment of the importance of the measure’s objective in WTO necessity analysis is still not entirely clear;”<sup>300</sup> (2) “the ‘aptness’ standard in WTO law is still somewhat embryonic and is yet to be fully clarified;”<sup>301</sup> (3) “[WTO analysis] requires detailed consideration of whether the respondent could actually adopt the proposed alternative, taking into account its resources and technical capacities;”<sup>302</sup> and (4) “[the] significant general difficulty with the WTO weighing and balancing test is its opacity. The test has been expressed in a number of different ways and *indeed seems to change*

---

294. DSU art. 21.6.

295. MOSAK, *supra* note 289, at 159 (citing *Argentina – Hides and Leather (Article 21.3)*).

296. DSU art. 22.2; *see* MOSAK, *supra* note 289, at 198–200 (on the rare resort to compensation due to problems of its voluntariness, prospective application, form through trade concessions and not money).

297. MOSAK, *supra* note 289, at 193.

298. *Supra* text accompanying notes 80 & 83.

299. Mitchell & Henckels, *supra* note 3, at 47.

300. *Id.* at 46.

301. *Id.* at 49.

302. *Id.* at 51.



*each time it is articulated . . . .*”<sup>303</sup> If this level of ambiguity and methodological inconsistency already subsists in the context of centralized, cyclical, and repeat adjudication by the WTO Appellate Body, one is left to wonder how the demonstrated dangers of this “weighing and balancing” proposal could somehow be avoided by dispersed and diversely-constituted investment arbitral tribunals with limited mandates to resolve particular one-off investment disputes. Andrew Mitchell and Caroline Henckels celebrate the “sophistication” of WTO jurisprudence, but omit to discuss how exactly an investment arbitral tribunal gets from point A (e.g., finding the GATT Article XX necessity test applicable despite vastly different treaty texts, as well as GATT Article XX’s evident differences with the customary norm of necessity under Article 25 of the Articles of State Responsibility), to point B (e.g., reaching a decision on the host State’s right to regulate well in accord with treaty interpretation rules and within the confines of the arbitral function). Opening the door to investment arbitral tribunals to this process of reasoning in its adjudication—in the absence of a comparable centralized adjudication system and a Member State-driven Dispute Settlement Body that ultimately determines, monitors, and oversees the adjustment of a respondent State’s challenged measure to bring it to GATT compliance—is inviting license for arbitral overreach. It will not necessarily yield just legal outcomes, as tribunals would have to engage in extensive *ex post* scientific and technical assessments of the legislative/administrative design and public policy objectives of the host State’s challenged measure, and then ascertain whether it was indeed “least restrictive” given other “reasonably available” alternatives. This is a ponderous slippery slope that only depends on the arbitrator’s self-restraint as a precarious limit.

### B. *Checking Criteria for Comparator Applicability: Investment Law*

Within the investment treaty regime, the State can assert its regulatory freedom to vindicate public interest or human rights concerns within the interpretation of the primary norm asserted to constitute the treaty breach (e.g., interpretation of the IIA standard of treatment alleged to have been violated such as fair and equitable treatment or indirect expropriation).<sup>304</sup> It may also attempt to assert the issue to

---

303. *Id.* (emphasis added).

304. See Marcela Klein Bronfman, *Fair and Equitable Treatment: An Evolving Standard* in, 10 MAX PLANCK Y.B. U.N. L. 609–80, (Armin von Bogdandy & Rüdiger Wolfrum eds., 2006); RONALD KLÄGER, ‘FAIR AND EQUITABLE TREATMENT’ IN INTERNATIONAL INVESTMENT LAW 158–59 (2011); ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, ‘INDIRECT EXPROPRIATION’ AND THE ‘RIGHT TO REGULATE’ IN INTERNATIONAL INVESTMENT LAW (2004), available at <http://www.oecd.org/investment/internationalinvestmentagreements/>

establish an independent first-order defense (e.g., “necessity” as a circumstance precluding wrongfulness under Article 25 of the Articles of State Responsibility, “non-precluded measures” under an IIA provision, or the notion of regulatory freedom as an independent customary norm of international law).<sup>305</sup> It may also assert the issue contextually, as an alternative defense to equitably mitigate or substantially reduce the ultimate value of compensation that it must pay for incurring liability through the IIA breach.<sup>306</sup> Regulatory freedom can be deployed as an argument for host States in various *ratione materiae* within an investment dispute precisely because of the nature of investment treaty texts and the formulation of substantive standards therein, the remedy designed under the investor-State dispute settlement mechanism, and the mandate of an investment arbitral tribunal convened only upon the consent of the parties.

Unlike WTO law which looks to provide a system of legality and adjudication to restore the economic equilibrium and terms of trade anticipated from trade liberalization commitments by eliminating or reforming trade-distorting State measures, the investment treaty regime operates to provide a predictable legal environment that guarantees anticipated investment returns to the investor alongside the macroeconomic gains received by the host State, considering risks identified at the establishment of the investment, as well as building in other risk premia to capture other risks that could materialize beyond the contemplation of the host State and the investor. The mechanism for restoring disruptions to the economic equilibrium of foreign market access in WTO law is primarily adjustment or elimination of a State’s challenged measure; while the mechanism for restoring disruptions to the anticipated flow of investment returns given assumed risks is a

---

33776546.pdf.

305. Davies, *supra* note 4. See also Anthony D’Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT’L & COMP. L. 47–98, 33 (1996).

[T]he only logically satisfying and empirically validating position to take on the source of human rights norms is that they derive from provisions in treaties. But people who are prisoners of the Contract Paradigm are disabled from taking such a position. I can only hope that with the passage of time this Paradigm, like the Sovereignty Paradigm, will gently erode . . .

*Id.*

306. Siemens AG v. Argentina, Award & Separate Opinion, ICSID Case No. ARB/02/8, Feb. 6, 2008; Diane A. Desierto, *ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model During Financial Crises*, 44 GEO. WASH. INT’L L. REV. 473 (2012); SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 330–38 (2009).

“price” mechanism<sup>307</sup> to remediate the loss of expected or agreed returns (e.g., compensation (either treaty-stipulated, as in the case of “prompt, adequate, and effective compensation” for expropriations),<sup>308</sup> or as a form of reparations under customary norms of international responsibility for breach of treaty provisions other than expropriation<sup>309</sup>).<sup>310</sup>

Moreover, the dispute between States in a WTO proceeding arises from mutually and multilaterally agreed trade liberalization commitments that are jeopardized by unjustified State measures that alter the terms of competition and result in inefficient trade; while the dispute between an investor and a host State arises from a pre-existing contractual setting, the non-performance of certain obligations by the host State or the investor in their established relationship within the jurisdiction of the host State, and the ensuing unjustified change in the forecasted returns from investment. While not every breach of a foreign investment contract will amount to an actionable breach of an IIA standard of protection,<sup>311</sup> acts of the host State toward the investment

---

307. Note recent literature critiquing the *quantum* reached by investment tribunals through the “price” mechanism, and arguing conceptual and methodological reconsideration. See Desierto, *supra* note 306; Mavluda Sattorova, *Investment Treaty Breach as Internationally Proscribed Conduct: Shifting Scope, Evolving Objectives, Recalibrated Remedies?* (Jan. 2013) (unpublished Ph.D. thesis), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=mavluda\\_sattorova&sei-redir=1&referer](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=mavluda_sattorova&sei-redir=1&referer) (last accessed Feb. 1, 2013).

308. For early doubts expressed concerning the supposed universality of the Hull formula, see Oscar Schachter, *Compensation for Expropriation (Editorial Comment)*, 78 AM. J. INT’L L. 1 (1984); Frank G. Dawson & Burns H. Weston, ‘Prompt, Adequate, and Effective’: A Universal Standard of Compensation?, 30 FORDHAM L. REV. 727, 757 (1962).

Far from being a ‘rule’ of international law in the extensive deprivation context, the demand for ‘full’ or ‘prompt, adequate and effective’ compensation would appear to be little more than a preference assumed for bargaining purposes – an element of legal mythology to which spokesmen pay ritualistic tribute and which has little meaning in effective policy.

*Id.*

309. See RIPINSKY & WILLIAMS, *supra* note 306, at 88–110.

310. Alan Sykes authoritatively proved that the private right of action for money damages in investment law is the appropriate efficient enforcement mechanism to signal that the State/capital importer will not engage in injurious practices against the capital exporter, while trade policy adjustment and the threat of withdrawal of trade concessions (authorized countermeasures) is the most efficient way to ensure compliance with government to government commitments in WTO law. See Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. (2005), reprinted in ECONOMICS OF PUBLIC INTERNATIONAL LAW 446–81 (Eric A. Posner ed., 2010).

311. See *Duke Energy Electroquil Partners & Electroquil SA v. Ecuador*, ICSID Case No. ARB/04/19, Award of Aug. 12, 2008, ¶ 345.

Establishing a treaty breach is a different exercise from showing a contract

that extend beyond the zones of permissible treatment defined under an IIA are what give rise to the host State's international responsibility to a third-party beneficiary of the IIA, (e.g., the investor). The ultimate question for a State asserting its regulatory freedom to vindicate public interest or human rights concerns is thus whether its measures taken under the aegis of regulatory freedom exceed the risk parameters and anticipated returns as understood by both the host State and the investor *at the time of the establishment of the contract*.

Most importantly, there is a markedly different *temporal* dimension to an investment tribunal's analysis of legally-actionable State disruptions to the economic equilibrium protected by investment treaties that contrasts with that undertaken by the DSU, the Appellate Body and dispute settlement panels in WTO law, and this difference shapes the nature of remedial measures taken by adjudicatory bodies. WTO analysis of regulatory measures will tend to focus on its prospective effects or impacts on market access, and remedies will be prescribed on the basis of that prospective assessment. In WTO tribunals' analysis of GATT Article XX exceptions, the relevant issue for determination is whether, at *Time 1*, a State's challenged regulatory measure is inconsistent with a Member State's GATT obligations (e.g., causes or results in an actionable trade-distortion or foreign market access restriction). If so, then, at *Time 1 + n*, the issue is whether the regulatory measure can be redesigned or calibrated toward achieving GATT consistency. At *Time 1 + n*, what matters for the DSU is to monitor the respondent State's implementation of the challenged measure to ensure that the latter is brought to conform with GATT and thereby immediately stop the injurious effects of the trade-distortion. If the redesign or withdrawal of the trade-distorting measure cannot be accomplished, then compensation by way of trade concessions (as a "second-best" alternative to avoid future damage from the continued existence of the measure) is a temporary option.<sup>312</sup> In the event of a respondent State's further recalcitrance or non-compliance, counter-measures may be authorized by the DSB in the form of authorizing WTO Members to suspend concessions or observance of other obligations toward the recalcitrant State.<sup>313</sup>

In investment treaty arbitration, however, once the primary liability

---

breach. Subject to the particular question of the umbrella clause, in order to prove a treaty breach, the Claimants must establish a violation different in nature from a contract breach, in other words a violation which the State commits in the exercise of its sovereign power.

*Id.*

312. BABU, *supra* note 288, at 193–202.

313. See DSU, art. 22.1.

of a host State is established for breach of an IIA standard of protection, the only issues left for the tribunal to resolve are whether a customary norm of necessity lawfully suspended the duty to perform the contemplated IIA standard of protection, or whether there is a specific provision in the IIA itself that would operate to excuse the host State from the second-order consequences (*e.g.*, the duty to compensate as a form of reparations) flowing from having incurred primary liability due to breach of the IIA. There is no room for an investment tribunal to calibrate a State's regulatory measure *ex post* to restore a loss of market access or prevent further injury from loss of market access—the host State's regulatory measure is simply taken as a given operative fact that must be assessed either in determining the existence of primary liability or the scope of second-order consequences arising after such primary liability is established. The analysis of a State's regulatory measure is therefore retrospective, and remedies are likewise prescribed with a view to ameliorating a past injury (not anticipating future losses to the investment). At *Time 1*, an investment tribunal determines whether an investment treaty breach has occurred and a State then puts forward its defense of regulatory freedom. The tribunal then has to work backwards, and determine whether the risk parameters and anticipated returns at *Time 1-n* were justifiably or unlawfully distorted by the State's challenged regulatory measure (*e.g.*, an actionable injury that engages international responsibility exists). If it finds that there is indeed actionable injury triggering international responsibility, the investment tribunal would have to prescribe compensation that approximately remedies the loss incurred in *Time 1-n*.<sup>314</sup>

---

314. Although there are cases involving other states such as *Unglaube and Unglaube v. Costa Rica*, Award, ICSID Case Nos. ARB/08/1 and ARB/09/20, May 16, 2012 (which involved an expropriation finding arising from regulatory actions taken by Costa Rica to create an ecological zone protecting the endangered leatherback sea turtles and their nesting sites), as well as *Técnicas Medioambientales Tecmed SA v. Mexico*, Award, ICSID Case No. ARB (AF)/00/2, May 29, 2003 (also involving an expropriation finding in relation to a Mexican government agency's Resolution ordering closure of a landfill for environmental reasons), the cases involving the Argentina financial crises of 2000–2002 are probably the most famous examples of failed attempts to justify social protection measures on the basis of human rights, public policy, or public interest reasons: *LG & E Energy Corp v. Argentina*, Decision on Liability, ICSID Case No. ARB/02/1/3, Oct. 2006, paras. 213–66; *Sempra Energy International v. Argentina*, Decision on Argentina's Application for Annulment of the Award, ICSID Case No. ARB/02/16, June 29, 2010, paras. 106–223; *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/0108, Apr. 25, 2005, paras. 315–92; *Enron Corporation and Ponderosa Assets, LP v. Argentina*, Award, ICSID Case No. ARB/01/3, May 22, 2007, paras. 303–39; *Cont'l Cas. Co. y v. Argentina*, Award, ICSID Case No. ARB/03/9, Sept. 5, 2008, paras. 219–85; *BG Group PLC v. Argentina*, Final Award, Ad hoc (UNCITRAL), Dec. 24, 2007, paras. 361–444; *National Grid PLC v. Argentina*, Ad hoc (UNCITRAL), Nov. 3, 2008, paras. 205–62; *Suez v. Argentina*, Decision on Liability, ICSID Case No. ARB/03/19, July 30, 2010, paras. 249–71; *Total SA v. Argentina*, Decision on Liability, ICSID Case No. ARB/04/1, Dec. 21, 2010, paras. 482–85; *El*

This is where the proposed application of the “least restrictive means” test in GATT Article XX “necessity” jurisprudence into investment arbitration turns on its head. Andrew Mitchell and Caroline Henckels extolled the “sophisticated” analytical value of setting up a comparison of a host State’s regulatory measures (as the supposed “least restrictive means”) with proposed “reasonable alternatives,” similar to what the Appellate Body and dispute settlement panels have done in “necessity tests” for GATT Article XX.<sup>315</sup> But they did not show how this method of reasoning could be replicated by an investment tribunal that mainly has to decide the existence of an IIA or treaty breach, and the quantum of compensation to remedy loss from the breach. Comparing a State’s regulatory measure with other “reasonably available alternatives” makes sense for a WTO tribunal that has to decide on altering the contours of that measure to bring it to full conformity with GATT commitments and the Member States’ multilateral expectations of market access. But comparing a host State’s regulatory measure with a plethora of other macroeconomic acts that it could or should have taken at *Time 1-n* does nothing for the assessment of primary liability, except to introduce a heightened level of subjectivity in, and arbitrary scrutiny of, the host State’s “treatment” of an investment and whether the same falls within the bounds of permissible treatment defined under the IIA. Given the universe of possible policy options and the propensity for hindsight or “black swan” reasoning often employed by economists,<sup>316</sup> more than likely an arbitral tribunal would be swamped by the parties with competing analyses by their respective expert economists, leading to at least some preponderance that “reasonably available alternatives” exist. Rather than afford a feasible defense to a State (presumably the purpose behind the Mitchell and Henckels’ proposal), the likely outcome would be quite similar to how investment tribunals have dealt with the virtually impossible requirement in the customary norm of necessity in Article 25

---

Paso Energy International Company v. Argentina, Award, ICSID Case No. ARB/03/15, Oct. 27, 2011, paras. 552–670; Impregilo SpA v. Argentine Republic, Final Award, ICSID Case No. ARB/07/17, June 21, 2011, paras. 336–60; Metalpar SA and Buen Aire SA v. Argentina, Award on the Merits, ICSID Case No. ARB/03/5, June 6, 2008, paras. 208–11; Siemens AG v. Argentina, Award and Separate Opinion, ICSID Case No. ARB/02/8, Feb. 6, 2007, paras. 79 & 354.

315. Mitchell & Henckels, *supra* note 3, at 56–57.

316. Metaphor originated by Nassim Nicholas Taleb to describe a surprising (and unexpected) event found to have had massive effects, which is subsequently rationalized (often wrongly or inappropriately) with the benefit of hindsight. See NASSIM NICHOLAS TALEB, *THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE FRAGILITY* (2d ed. 2010). Paul Krugman has also acknowledged the difficulty of formally modeling international economic crises. See Paul Krugman, *The International Aspects of Financial Crises*, in *THE RISK OF ECONOMIC CRISIS* 85–134 (Martin Feldstein ed., 1991).

of the Articles of State Responsibility that the measure taken was the “only way for the State to safeguard an essential interest against a grave and imminent peril.”<sup>317</sup> Under the Mitchell and Henckels proposal where investment arbitral tribunals would have full sway to “weigh and balance” the host State’s regulatory measure and proposed alternatives at hindsight (and even with the fiction of “margin of appreciation”), it would be more likely that a host State would be unable to bear the additional evidentiary burden of showing that other alternatives to the challenged regulatory measures were not realistically available at *Time 1-n*. Neither is the evidentiary burden clearly explicated for the claimant investor that posits “other reasonable alternatives” (whether regulatory measures or macroeconomic policies) that the host State could or should have taken to avoid injury to the investment. Much of this line of analysis sweepingly induces an arbitral tribunal to engage in more speculative and hindsight armchair reasoning on host States’ macroeconomic policies and the design of government regulations that could have avoided or diminished injury or loss to the value of the investment, in order to resolve the questions of the existence of an IIA breach, and the level of compensation required to redress such breach. This analysis is suited to WTO tribunals that have to issue recommendations to calibrate, withdraw, or adjust a respondent State’s regulatory measure to prevent further trade distortions or unjustifiable market access restrictions against other WTO Member States, but it makes no sense whatsoever for investment tribunals tasked with providing compensatory redress for IIA breaches.

Interestingly, the recent UNCTAD Investment Policy Framework for Sustainable Development (IPFSD) acknowledges the complexities of designing language for public policy exceptions in IIAs,<sup>318</sup> and one of its suggested options is patterned after GATT Article XX language in IIA treaties. This has already been concretely followed in recent treaty practice, specifically the 2009 ASEAN Comprehensive Investment Agreement (ACIA), Article 17 (General Exceptions) which is a replica of GATT Article XX/GATS Article XIV exceptions. Although this provision has not yet been tested by an arbitral tribunal, several interpretive difficulties could already be anticipated for an investment arbitral tribunal tasked to apply this provision. Would the tribunal defer to a host State’s (self-judged) invocation of the public policy objective specified in the enumerated exceptions, and if so, to what extent will

---

317. On the evidentiary hurdles to meet the “only way” requirement in Article 25 of the Articles of State Responsibility, see *Enron Corporation and Ponderosa Assets LP v. Argentina*, ICSID Case No. ARB/01/3, Decision on Application for Annulment, ¶¶ 368–77 (July 30, 2010); *EDF Int’l SA v. Argentina*, ICSID Case No. ARB/03/23, ¶¶ 1171–72 (June 11, 2012).

318. See IPFSD text on suggested options for designing such exceptions in <http://www.Investmentpolicyhub.unctad.org/Views/Public/content.aspx?sid=3>.

this deference affect its standard of review for the exception-based defense? If the tribunal will not defer to the self-judged assessment of a host State, what *onus probandi* would it assign to a host State invoking, for example a “public morals” exception? If the investment tribunal were to apply the “least restrictive means” test to establish the necessity of a host State measure, would it mean that it would first make a preliminary finding that the host State measure breaches the IIA, and afterwards require the host State to prove its exception as opposed to some kind of “reasonably available alternative” under the “weighing and balancing approach”? (As already discussed, this method of reasoning contains its own set of evidentiary complications). Finally and most importantly, what effect on a State’s international responsibility is intended by the phrase “*nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures*”<sup>319</sup>—does it result in the inexistence of any primary breach due to the wholesale inapplicability of a treaty (e.g., an effect of treaty inapplicability that is not borne out by WTO jurisprudence on GATT Article XX, but which is unique to the *Continental Casualty* interpretation<sup>320</sup>), or does it affect the second-order consequences of primary breach (e.g., mitigation or reduced damages)? While one can understand the function of GATT Article XX as a State’s residual defense seeking to permit the continuity of the measure notwithstanding its possibly trade-distorting or market access-restricting impact (and notably after the WTO tribunal already finds that measure to be non-compliant or inconsistent with GATT), one is not too sure about what treaty effects will be generated from a GATT Article XX-type provision in an IIA that says utterly nothing about preventing a treaty breach from arising, preventing a treaty from being applicable, or preventing international responsibility from attaching. The only effect that could be literally read from the phrase “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures” is that the Agreement will literally NOT be construed or interpreted to prevent a Member State from adopting or enforcing such measures. But at *Time 1*, when an arbitral tribunal has to deal with a host State that has already enforced the regulatory measure that causes economic injury to an investment or a breach of an IIA standard of protection in *Time 1-n*, what is still there to prevent? How would a “weighing and balancing” approach then serve any realistic purpose to afford host States a genuine defense against a primary breach when the evidentiary burden is increased? Clearly, there is a need to scrutinize the actual functional criteria for making investment tribunals use WTO law

---

319. ACIA, *supra* note 157, art. 17(1).

320. Desierto, *supra* note 15, at 882–93.



as a relevant comparator in investment law.

The literature on the WTO law *qua* investment law proposition has not yet reached a point where the premises, policies, and methods of comparisons between both regimes have been fully and transparently disclosed.<sup>321</sup> Rather, the proposition has often been argued from the standpoint of either supposedly shared normative or genealogies or teleologies between treaty texts (e.g., “necessity,” “most favoured nation treatment,” “national treatment”),<sup>322</sup> glowing descriptions of the settled interpretive processes within WTO adjudication,<sup>323</sup> or by arguing the negative consequences of keeping both WTO law and investment treaty regimes “separate.”<sup>324</sup> But each of these approaches have been inadequate to justify the *function* of the comparison or transposition of WTO law into investment law interpretation. First, while shared normative genealogies, teleologies, or common *travaux* might prove true in some IIAs (especially for those negotiated within or alongside free trade agreements<sup>325</sup>), there has not been any empirical validation of the latter for the entire constellation of IIAs—at least enough to say that the WTO law *qua* investment law proposition can indeed be generalized to all IIAs. Second, celebrating WTO interpretive methods, as previously shown, does not address the crucial question of how to validly apply or transplant them into investment treaty interpretation—whether it would be through a “broad” (albeit questionable) construction of the investment arbitral mandate or a demonstrable textual or contextual nexus with the IIA standard within the system of unitary interpretation in VCLT Article 31. Finally, listing some negative consequences that could arise from keeping both treaty regimes separate, without discussing how these consequences overpower any perceived or actual gains from distinct treaty regime design and institutions, unfortunately misses out on the rest of the analysis necessary in an actual cost-benefit equation.<sup>326</sup> If the WTO law *qua* investment law proposition is to be accepted as the public policy tool for resolving contended “legitimacy” issues on the right to regulate in international investment law, clearly we need more well-developed criteria before we seek to turn our investment arbitrators into full-scale

---

321. *Supra* note 3.

322. *Supra* note 3; see also Robert Howse, *The Relevance of WTO Law and Jurisprudence to Investor-State Dispute Settlement* (Notes for Panel Discussion), INVESTMENT TREATY FORUM-BRITISH INSTITUTE FOR INTERNATIONAL AND COMPARATIVE LAW (Sept. 9, 2011), available at [http://www.biiicl.org/files/5638\\_robert\\_howse.pdf](http://www.biiicl.org/files/5638_robert_howse.pdf).

323. Mitchell & Henckels, *supra* note 3.

324. Broude, *supra* note 25.

325. See Diane A. Desierto, ‘For Greater Certainty’: *Balancing Economic Integration and Investor Protection in the New ASEAN Investment Agreements*, 8 TRANSNAT’L DISP. MGMT. 5 (2011).

326. See ROBERT J. BRENT, APPLIED COST-BENEFIT ANALYSIS 6–9 (2d ed. 2006).

comparativists.

A basic method in comparative law that might prove to be of some use in making this determination, although not without its detractors,<sup>327</sup> is the “functional method” in comparative law.<sup>328</sup> The basic principle of all comparative law, according to this method, is “functionality”—all other rules which determine from the choice of laws to be compared, the scope of the undertaking, and the creation of the system of comparison are to be determined according to functional terms—“[functionality] rests on what every comparatist learns . . . that the legal system of every society faces essentially the same problems, and solves these problems by quite different means, though very often with similar results.”<sup>329</sup> Some of the basic premises of the functional method are the following: (1) there is a relationship between concept and function, such that “[r]ules, which have functions or purposes, are framed in terms of concepts . . . unless concepts are themselves defined in terms of the purposes that the rules serve, they become ‘doctrinal abstractions’ that are obstacles to understanding the rules;”<sup>330</sup> (2) the meaning of “function” or “purpose” is “the end served by a rule . . . an end which accounts for its structure and its contribution to the behavior of a larger structure of which it is a part: the legal system . . . ;”<sup>331</sup> and (3) even when there are

deeper universal values that all societies share . . . these values are expressed in different ways. It does not follow that the legal systems of all societies . . . face the same problems. Problems that have been solved by jurists in some societies . . . have been solved elsewhere in other ways . . . .<sup>332</sup>

Applying this method of functionality, especially in this Part III, it should be evident that the spaces for commonality of treaty functions, adjudicatory functions, remedial functions, and institutional functions, for WTO law and investment law, respectively, appear much more diminished than others might intuitively assume. There are historical as well as policy reasons for the emergence of these distinct treaty systems, and in particular, the remedial measures within these systems.

---

327. Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, 339–82 (Mathias Reimann & Reinhard Zimmermann eds., 2007). It has also been described as a “chimera, in both the theory and practice of comparative law.” See PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 339 (1999).

328. See CRUZ, *supra* note 327, at 230; James Gordley, *The Functional Method*, in METHODS OF COMPARATIVE LAW 107–19 (Pier Giuseppe Monateri ed., 2012).

329. CRUZ, *supra* note 327, at 230–31.

330. Gordley, *supra* note 328, at 110.

331. *Id.* at 114.

332. *Id.* at 118.

Thus far, we have examined the WTO law *qua* investment law provision from a somewhat microscopic lens of treaties, constitutive decision-making processes, institutional structures and interpretive communities, and the subject-matter addressees of a State's regulatory freedom in each regime. The following Part IV attempts a brief critical historical analysis to explore the state of human rights compliance facilitated by, or accomplished under the auspices of, the WTO system (including reform areas that remain in progress), to further examine the plausibility of using WTO law as the "public policy toolbox" for the international investment treaty regime.

#### IV. HUMAN RIGHTS AS A WORK IN PROGRESS: THE UNCERTAIN SUCCESS OF WTO LAW'S POST-NEOLIBERAL PUBLIC POLICY PARADIGM

##### A. *Viewing Human Rights in the WTO as a Sociological Project*

It would be well-nigh impossible for this Part to capture the complete record of human rights compliance facilitated by the WTO (or otherwise) in nearly thirty years of its institutional existence. Indeed, the narratives of engagement of human rights in trade (and vice-versa) have been anything but linear, to the point that one can only characterize the WTO as having achieved an uncertain success in the area of facilitating human rights compliance, and ensuring that trade policies and actions of Member States do not inhibit, prevent, or impede fulfillment of their human rights obligations.<sup>333</sup> Andrew Lang has observed that

[d]uring any particular historical period, both the trade and human rights regimes represent a contingent compromise between the partisans of each perspective – a compromise which evolves over time as their relative influence changes . . . each regime is composed of complex and layered social phenomena . . . classical liberalism represents only one strand in the complex and contested ideological foundations of the trade regime.<sup>334</sup>

He finds that the "normative orientation" of the WTO system is significantly influenced by "collective purposes" and "shared ideologies

---

333. Jeff Waincymer valuably discusses the significance of interdisciplinary approaches from law, economics, political science, and philosophy to fully assess the status and prospects of the trade and human rights debate in the WTO. See Jeff Waincymer, *The Trade and Human Rights Debate: Introduction to an Interdisciplinary Analysis*, in THE WORLD TRADE ORGANIZATION AND HUMAN RIGHTS, 1–38 (Sarah Joseph et al., eds. 2009).

334. LANG, *supra* note 49, at 57–58.

which animate that regime at any particular point in time,” so much so that “major re-orientations of the trade regime may not be possible without sustained contestation and destabilization of dominant ideas relating to the objectives of the regime, the purposes it serves, and the causal pathways by which it contributes to the achievement of those purposes.”<sup>335</sup> The rise of, and resistance to, neoliberal thought in each respective regime accompanied the legal relationship between trade and human rights—in ways that reflect the legal tensions as “interventions into the political struggles *internal* to each regime.”<sup>336</sup>

There is much that persuades in the above sociological lens for viewing the (at times institutionally-conflicting<sup>337</sup>) dialectic between WTO law and human rights. Certainly the body of analytical studies and experts’ reports from the United Nations Office of the High Commissioner for Human Rights (OHCHR) that explores the trade-human rights linkage and implications over the past decade often articulated many concrete political and social protection concerns, concordantly with its call for WTO Member States to design comprehensive compliance of their international human obligations alongside trade liberalization commitments.<sup>338</sup> The bulk of these reports and studies define the key pillars of the “human rights-based approach to trade,” summarized by the OHCHR as: (1) “respecting the principle of non-discrimination” by ensuring that individuals and groups are

335. *Id.* at 58.

336. *Id.* at 59.

337. One need only recall the WTO’s public complaint in 2000 to the U.N. High Commissioner for Human Rights Mary Robinson regarding an expert study issued by the OHCHR on the human rights implications for globalization, and the exchanges that ensued between both institutions thereafter. See Someshwar Singh, *UN Human Rights Commissioner Responds to the WTO*, THIRD WORLD NETWORK (Aug. 29, 2000) <http://twinside.org.sg/title/responds.htm>. Institutional frictions, however, have smoothened over a decade since then. See Statement of U.N. High Commissioner for Human Rights Navanathem Pillay to the WTO Public Policy Forum, “Doing it Differently: Reshaping the Global Economy” (Geneva, Sept. 16, 2010) available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10346&LangID=E>.

338. See Analytical study of the High Commissioner for Human Rights on the fundamental principle of participation and its application in the context of globalization, E/CN.4/2005/41, 23 Dec. 2004; Mainstreaming the right to development into international trade law and policy at the World Trade Organization, E/CN.4/Sub.2/2004/17, June 9, 2004; The right of everyone to the enjoyment of the highest attainable standard of physical and mental health—Mission to the World Trade Organization, E/CN.4/2004/49/Add.1, Mar. 1, 2004; Analytical study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalization, E/CN.4/2004/40, Jan. 15, 2004; Human rights and trade, Submission to the 5th WTO Ministerial Conference, Cancun, Mexico, Sept. 10–14, 2003; Human rights, trade and investment, E/CN.4/Sub.2/2002/9, June 25, 2002; Globalization and its impact on the full enjoyment of human rights, E/CN.4/2002/54, Jan. 15, 2002; The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights, E/CN.4/Sub.2/2001/13, June 27, 2001.

protected against overt discrimination in multilateral trade processes, as well as by ensuring that they are not excluded from deliberations or policy-making in trade; (2) “promoting popular participation” in the development of trade rules and policies through democratic consultative processes not just reserved for States but also for individual and group constituencies impacted by trade; (3) using “human rights impact assessments” to monitor the potential and real impacts of trade rules and policies on the enjoyment of human rights by individuals and groups; (4) “promoting accountability” in trade liberalization processes for individuals to have recourse, particularly on the justiciability of economic, social, and cultural rights; (5) “ensuring the promotion of corporate social responsibility initiatives” for standard practices of traders and investors; and (6) “encouraging international cooperation and assistance” that enables poorer countries to adjust to the trade process and benefit from its reform.<sup>339</sup>

Depending on perspective, one can either view WTO as having the ability to facilitate compliance with international human rights treaties,<sup>340</sup> and conversely, as ineffective in curtailing human rights violations of WTO Member States.<sup>341</sup> As previously discussed, Susan Ariel Aaronson noted in 2007 that there was already significant progress in the political and policy “seepage” of human rights (and a human rights consciousness) into the WTO decisions of the political organs as well as the legal/adjudicatory system under the DSU.<sup>342</sup> The current deadlock on substantive human rights, development, and public policy issues in the Doha Round might be enough for some to indict the WTO system for its paralysis or vulnerabilities to multilateral stalemate when it comes to addressing deeper issues of income inequalities, deficits in meaningful social participation and opportunities for enabling human rights capabilities.<sup>343</sup> At best, this lends a picture of the WTO

339. See *Globalization-Trade and Investment*, <http://www.ohchr.org/EN/issues/Globalization/Pages/Globalizationindex.aspx> (last visited Jan. 10, 2013).

340. See generally Marceau, *supra* note 14; Stephen Joseph Powell, *The Place of Human Rights Law in World Trade Organization Rules*, 16 FLA. J. INT'L L. 2, 219–31 (2004); Pascal Lamy, *Trade and Human Rights Go Hand in Hand*, Speech of the WTO Director-General (Sept. 26, 2010), available at [http://www.wto.org/english/news\\_e/sppl\\_e/sppl172\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl172_e.htm); Robert Howse & Ruti G. Teitel, *Beyond the Divide: the International Covenant on Economic, Social and Political Rights and the World Trade Organization*, in *THE WORLD TRADE ORGANIZATION AND HUMAN RIGHTS* 39–68 (Sarah Joseph et al. eds., 2009).

341. See Dean Dalke, *Enforcing Human Rights through the WTO: A Critical Appraisal*, *Occasional Papers in International Trade Law and Policy*, 58 CARLETON UNIV. (2004); Virginia A. Leary, *The WTO and the Social Clause: Post-Singapore*, 8 EUR. J. INT'L L. 118 (1997).

342. Aaronson, *supra* note 199.

343. See Andreas Blüthner, *Trade and Human Rights at Work: Next Round Please . . . ?*, in *AGREEING AND IMPLEMENTING THE DOHA ROUND OF THE WTO* 335–73 (Harald Hohmann ed., 2008); Ruth Bergan, *WTO Fails the Poorest – Again*, *GUARDIAN* (July 29, 2011), <http://www.guardian.co.uk/global-development/poverty-matters/2011/jul/29/wto-doha-fails-poo>

system as a work in progress on the trade and human rights debate, where its policies and governance framework assuredly remains subject to reform.<sup>344</sup> What these also ultimately convey, for purposes of scrutinizing the WTO law *qua* investment law proposition, is that the WTO gridlock on these issues, borne out of its own institutional, ideological, and political experiences, neither inspires its emulation or replication in the dispersed, decentralized, and diffuse investment treaty regime.

### *B. Human Rights Impact Assessments and Interdisciplinarity*

What is of more interest (and in my view also a more realistically feasible common gateway between WTO law and investment law to effectuate human rights compliance in international investment law),<sup>345</sup> for purposes of getting a more substantial and empirically-based perspective of WTO impacts on human rights compliance for future operational design of State policies and regulations, is the visible trend towards mainstreaming the use of human rights impact assessments (HRIAs) of trade-related policies.<sup>346</sup> While there is a growing body of scholarly literature that accepts the use of HRIAs, elaborates on their possible design, and explains methods for conducting them in relation to trade and development policies,<sup>347</sup> there is little as yet published that reports actual operational findings from HRIAs of WTO policies.<sup>348</sup> But

---

rest-countries.

344. See REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE pt. I (Ernst-Ulrich Petersmann & James Harrison eds., 2005) (WTO Negotiators and Academics Analyse the Doha Development Round of the WTO: Overview and Summary of the Book).

345. Bruno Simma & Diane Desierto, *Bridging the Public Interest Divide: Committee Assistance for Investor-Host State Compliance with the ICESCR*, 10 TRANSNAT'L DISP. MGMT. 1 (2013); Diane A. Desierto, *Sovereign Policy Flexibility for Social Protection: Managing Regulatory Risks in IIAs*, Report to the Mauritius International Arbitration Conference (Dec. 2012).

346. See Ibrahim Salama, *Human Rights Impact Assessments of Trade-Related Policies*, in SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW 217–55 (Markus W. Gehring & Marie-Claire Cordonier Segger eds., 2005).

347. See Fabiane Baxewanos & Werner Raza, *Human Rights Impact Assessments as a New Tool for Development Policy?* (OFSE, Working Paper No. 37, 2013), available at [http://www.oefse.at/Downloads/publikationen/WP37\\_Human\\_Rights.pdf](http://www.oefse.at/Downloads/publikationen/WP37_Human_Rights.pdf); James Harrison, *Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments*, unpublished paper for the Expert Seminar on Human Rights Impact Assessments of Trade and Investment Agreements (Geneva June 23–24, 2010), available at [http://www2.warwick.ac.uk/fac/soc/law/chrp/projectss/humanrightsimpactassessments/harrison\\_background-hria\\_2010.pdf](http://www2.warwick.ac.uk/fac/soc/law/chrp/projectss/humanrightsimpactassessments/harrison_background-hria_2010.pdf).

348. See Berne Declaration, Canadian Council for International Co-operation & Misereor (2010). *Human Rights Impact Assessments for Trade and Investment Agreements*, Report of the Expert Seminar (June 23–24, 2010), available at [http://www.ccic.ca/what\\_we\\_do/Report\\_](http://www.ccic.ca/what_we_do/Report_)

there are some incipient examples of HRIA analysis already filtering somewhat into the analysis of trade agreements, such as the 2011 issuance of the U.N. Special Rapporteur on the Right to Food, Olivier de Schutter, prescribing Guiding Principles on human rights impact assessments of trade and investment agreements;<sup>349</sup> Canada's first official HRIA report in May 2012 on the impact of the Free Trade Agreement between Canada and the Republic of Colombia;<sup>350</sup> and the WTO's own public policy efforts in 2009 to conceptualize and implement a system of HRIAs for trade agreements.<sup>351</sup> James Harrison and Alessa Goller have pointed out problems of methodology, measurement, information reliability and data verifiability that afflict many HRIA proposals.<sup>352</sup> In a 2012 EJIL article, Philip Alston and Colin Gillespie proposed adapting open-source technologies to diversify and cross-verify the information gathering processes on human rights compliance.<sup>353</sup>

There are likewise counterpart developments within the U.N. system for the establishment of statistical and empirical databases to track State compliance with human rights, specifically including economic, social, and cultural rights. In 2006, the U.N. Office of the High Commissioner for Human Rights prepared a Report ("Indicators for monitoring compliance with international human rights instruments: a conceptual and methodological framework") in response to the requests of chairpersons of the various human rights treaty bodies.<sup>354</sup> The High Commissioner stressed the particular utility of setting up quantitative indicators for the task of treaty monitoring:

---

HRIA-seminar\_2010\_eng%5B1%5D.pdf; Saskia Bakker et al., *Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI)*, 1 J. HUM. RTS. PRAC. 436 (2009).

349. Report of the Special Rapporteur on the right to food, Olivier de Schutter, Addendum: Guiding principles on human rights impact assessments of trade and investment agreements, A/HRC/19/59/Add.5, Human Rights Council (Dec. 19, 2011), available at [http://www.bilaterals.org/IMG/pdf/A.HRC.19.59.Add.5\\_English.pdf](http://www.bilaterals.org/IMG/pdf/A.HRC.19.59.Add.5_English.pdf).

350. See Annual Report Pursuant to the Agreement Concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia (May 15, 2012), available at [http://www.codev.org/wp/wp-content/uploads/2012/05/DFAIT\\_CCFTA\\_HR.pdf](http://www.codev.org/wp/wp-content/uploads/2012/05/DFAIT_CCFTA_HR.pdf).

351. See WTO Public Forum 2009, *Global Problems, Global Solutions: Towards Better Global Governance*, at 60–64 (WTO 2010), available at [http://www.wto.org/english/res\\_e/books\\_p\\_e/public\\_forum09\\_e.pdf](http://www.wto.org/english/res_e/books_p_e/public_forum09_e.pdf).

352. James Harrison & Alessa Goller, *Trade and Human Rights: What Does 'Impact Assessment' Have to Offer?*, 8 HUM. RTS. L. REV. 587 (2008).

353. Philip Alston & Colin Gillespie, *Global Human Rights Monitoring, New Technologies, and the Politics of Information*, 23 EUR. J. INT'L. L. 1089 (2012).

354. Report on Indicators for Monitoring Compliance with International Human Rights Instruments, HRI/MC/2006/7 (May 11 2006), available at [http://hrbaportal.org/wp-content/files/2006\\_Article\\_English.pdf](http://hrbaportal.org/wp-content/files/2006_Article_English.pdf).

[I]n the context of the ongoing reform of the treaty bodies in general, and the Reporting procedure in particular, it has been argued that the use of appropriate quantitative indicators for assessing the implementation of human rights – in what is essentially a qualitative and quasi-judicial exercise – could contribute to streamlining the process, enhance its transparency, make it more effective, reduce the Reporting burden and above all improve follow-up recommendations and concluding observations, both at the committee, as well as the country, levels.<sup>355</sup>

The High Commissioner distinguished human rights “indicators” (e.g., “specific information on the state of an event, activity, or an outcome that can be related to human rights norms and standards, that address and reflect the human rights concerns and principles; and that are used to assess and monitor promotion and protection of human rights”),<sup>356</sup> from “benchmarks” (e.g., “indicators that are constrained by normative or empirical considerations to have a predetermined value”), which the Committee on Economic, Social and Cultural Rights particularly favors.<sup>357</sup> Indicators may be quantitative or qualitative.<sup>358</sup> In defining the conceptual framework for human rights indicators, the High Commissioner drew attention to several methodological matters:

First, there is a need to anchor indicators identified for a human right in the normative content of that right, as enumerated in the relevant articles of the treaties and related general comments of the committees. Secondly, it is necessary to reflect cross-cutting human rights norms or principles (such as non-discrimination and equality, indivisibility, accountability, participation and empowerment) in the choice of indicators. Thirdly, the primary focus of human rights assessment (and its value-added) is in measuring the effort that the duty-holder makes in meeting his/her obligations – irrespective of whether it is directed at promoting a right or protecting it. At the same time, it is essential to get a measure of the “intent or acceptance of” human rights standards by the State party, as well as the consolidation of its efforts, as reflected in appropriate “outcome” indicators. While such a focus recognizes an implicit linkage between the intent of a State party, its efforts in meeting those commitments and the consolidated outcomes of those efforts, the linkage may not

---

355. *Id.* para. 3.

356. *Id.* para. 7.

357. *Id.* para. 12.

358. *Id.* para. 8.



always translate into a direct causal relationship between indicators for the said three stages in the implementation of a human right. This is because human rights are indivisible and interdependent such that outcomes and the efforts behind the outcomes associated with the realization of one right may, in fact, depend on the promotion and protection of other rights . . . . [S]uch a focus in measuring the implementation of human rights supports a common approach to assessing and monitoring civil and political rights, as well as economic, social and cultural rights . . . the adopted framework should be able to reflect the obligation of the duty-holder to *respect, protect, and fulfill* human rights.<sup>359</sup>

The High Commissioner then laid out a sequence for developing the conceptual framework defining indicators for substantive human rights: (1) identifying the “attributes” of a right (“limited number of characteristic attributes that facilitate the identification of appropriate indicators for monitoring the implementation of the right”<sup>360</sup>); (2) defining the configuration of *structural indicators* (e.g., “the ratification/adoption of legal instruments and existence of basic institutional mechanisms deemed necessary for facilitating realization of the human right concerned”<sup>361</sup>), process indicators (e.g., “relat[ing] State policy instruments to milestones that become outcome indicators, which in turn can be more directly related to the realization of human rights . . .”<sup>362</sup>), and *outcome indicators* (e.g., “attainments, individual and collective, that reflect the status of realization of human rights in a given context . . . often a slow-moving indicator, less sensitive to capturing momentary changes than a process indicator”<sup>363</sup>); (3) developing sources and data-generating mechanisms (e.g., socioeconomic and administrative statistics, events-based data on human rights violations<sup>364</sup>); and (4) imposing criteria for the selection of quantitative indicators (e.g., “relevant, valid and reliable,” “simple, timely and few in number,” “based on objective information and data-generating mechanisms,” “suitable for temporal and spatial comparison and following relevant international statistical standards,” and “amenable to disaggregation in terms of sex, age and other vulnerable or marginalized population segments”<sup>365</sup>).

---

359. *Id.* para. 13.

360. *Id.* para. 14.

361. *Id.* para. 17.

362. *Id.* para. 18.

363. *Id.* para. 19.

364. *Id.* paras. 24 & 25.

365. *Id.* para. 26.

Using the *structure-process-outcome* indicators framework, the High Commissioner has since drawn up lists of illustrative indicators on civil and political rights as well as economic, social and cultural rights, and subjected such indicators to a comprehensive validation process before international experts, members of global academia, non-governmental organizations, international organizations, and national level policy-makers.<sup>366</sup> Among the ICESCR rights covered in the list of illustrative indicators are the right to the enjoyment of the highest attainable standard of physical and mental health, the right to adequate food, the right to adequate housing, the right to education, the right to social security, the right to work, and the right to freedom of opinion and expression.<sup>367</sup> The High Commissioner had also previously issued a Handbook for National Human Rights Institutions on the implementation of the ICESCR.<sup>368</sup> Notably, in 2012, the Office of the U.N. High Commissioner for Human Rights issued its consolidated volume, "Human Rights Indicators: A Guide to Measurement and Implementation,"<sup>369</sup> which further developed the *structure-process-outcome indicators* conceptual framework for determining State compliance with international human rights treaties, particularly the ICESCR.

While the nascent state of the HRIAs thus far has not lived up to the promise of their contribution to the assessment and strategic design of WTO reforms, this is at least one promising area that could yield a broader and more reliable base of information for characterizing the success or failure of the WTO in facilitating human rights compliance by its Member States. It would also aid towards enabling more human rights-compliant and consistent trade and investment policy-making by States in the future.

## V. MEDIATING THE ICESCR: A HEURISTIC FOR FUNCTIONAL DECISION-MAKING IN WTO LAW AND INVESTMENT LAW

The preceding Parts II, III, and IV laid out my contextual policy arguments against the automatic reception of WTO law into investment law to address the latter's public policy quandaries. In the following

---

366. U.N. Office of the High Commissioner for Human Rights, *Rep. on Indicators for Promoting and Monitoring the Implementation of Human Rights*, para. 2, U.N. Doc. HRI/MC/2008/3 (June 6, 2008).

367. *Id.* see annexes to the Article.

368. U.N. Office of the High Commissioner for Human Rights, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*, U.N. Doc. HR/P/PT/12, U.N. Sales No. E.04.XIV.8 (2005).

369. U.N. Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation*, U.N. Doc. HR/PUB/12/5 (2012).

subsections, I contrast some differences in the proposed use of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) to justify State regulatory freedoms in WTO law and investment law. Perhaps more than any other human rights treaty, ICESCR obligations stand to shape and directly affect the content and substance of a State's social protection agenda. States are more than likely to find that public policy objectives, for which they seek to maintain regulatory freedom in either WTO law or investment law, are already mirrored within ICESCR obligations. To give a concrete example of the limits to the WTO law *qua* investment law proposition (or the supposed usefulness of WTO law to public policy issues in investment law), I point out how there have been material differences in the mediation of the ICESCR in WTO law (which reflects much of the same public policy objectives asserted to justify a State's regulatory freedom), as opposed to international investment law. These differences will endure, I submit, so long as the design of treaty texts and the composition of the epistemic and interpretive communities I described in Part II, remain divergent between the WTO treaty regime and the investment treaty regime.

#### A. ICESCR and WTO Law

The record and practice of WTO law has shown that, despite the interpretive openness of WTO treaty texts to public policy objectives and the broad judicial function wielded by the Appellate Body and the dispute settlement panels, the ICESCR has not figured significantly within the nearly thirty-year *acquis* of WTO law and jurisprudence, although a few Member States (notably, Mauritius and Brazil) have specifically invoked the ICESCR to justify State regulatory freedom to protect non-trade concerns.<sup>370</sup> I suggest that this is less about the actual salience of the ICESCR to a WTO litigation, than it is a trend exhibiting a more conservative tendency on the part of States against putting the ICESCR into practice to lend substantive content to public policies already textually-referred to in WTO treaty provisions, such as GATT Article XX, GATS Article XIV, SPS Agreement Articles 2.1 and 2.2, TBT Agreement Article 2.2. This view accords with Holger Hestermeyer's recent findings on the possible uses of the ICESCR

---

370. See Caroline Dommen, *Safeguarding the Legitimacy of the Multilateral Trading System: The Role of Human Rights Law*, in INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES 121, 127 (Frederick M. Abbott et al. eds., 2006) (citing Brazil's leadership efforts in having a WTO resolution adopted on access to essential medicines against pandemics such as HIV/AIDS, and Mauritius' reference to the ICESCR to support its position that the WTO Agreement on Agriculture should allow recognition of non-trade concerns.).

within the WTO political organs and the DSU.<sup>371</sup> Acknowledging that the overwhelming majority of WTO Member States are also parties to the ICESCR, in his investigation of WTO law and practice, Hestermeyer found that: (1) the WTO itself is not bound by the ICESCR even if its Member States are individually bound; (2) the ICESCR's role in WTO dispute settlement is limited since it cannot be directly enforced or applied by the panels or the Appellate Body given their jurisdictional competences under the DSU, but that the ICESCR may be used to interpret WTO treaty norms in accordance with "customary rules of interpretation of public international law" permitted under Article 3.2 of the DSU; (3) in practice, States have not been lodging arguments based on the ICESCR when they avail of the extended litigation process under the DSU, preferring instead to specify WTO treaty norms that already refer to public policy objectives; and (4) except for a few instances involving labor rights and health rights, the political organs of the WTO have rarely referred to economic, social and cultural rights in their decisions.<sup>372</sup>

Certainly, such observations regarding WTO law and jurisprudential practices do not yet confirm the possibilities for using the ICESCR in WTO practices that Robert Howse and Ruti Teitel have hypothesized, finding that "the [WTO] treaties themselves have been structured in many ways so as to ensure that the means adopted in the WTO to achieve economic goals are not inconsistent with the human purposes and values intrinsic to the norms in the ICESCR."<sup>373</sup> Compatibilities between the Preamble to the WTO Agreement and Article 2(1) of the ICESCR,<sup>374</sup> for example, teleologically support the human security notion embedded in the ICESCR, which creates a "normative floor for the interpretation and application of the WTO treaties . . ."<sup>375</sup> While they concede hurdles to the interpretation of WTO treaty provisions that specifically build in policy flexibilities (*e.g.*, GATT Article XX), Howse and Teitel carefully demonstrate that States' regulatory freedoms in WTO law to vindicate ICESCR obligations could be harnessed through

---

371. Holger P. Hestermeyer, *Economic, Social, and Cultural Rights in the World Trade Organization: Legal Aspects and Reality*, pt. 3, <http://www.boletinderecho.udp.cl/docs/PaperHestermeyer.pdf> (last visited Jan. 10, 2013).

372. *Id.*; on the salience of the ICESCR to the WTO, see Fons Coomans, *Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisations*, 11 MAX PLANCK Y.B. U.N. 359, 359–90, 372–75 (2007).

373. Hestermeyer, *supra* note 371; Howse & Teitel, *supra* note 340, at 7. The position resembles a famous 2000 policy paper: Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, in HUMAN RIGHTS IN DEVELOPMENT YEARBOOK: THE MILLENNIUM EDITION 51, 52–82 (Hugo Stokke & Arne Tostensen eds., 2001).

374. Howse & Teitel, *supra* note 340, at 42–43.

375. *Id.* at 47.

programmatic adjustments of trade policies in ways that functionally operationalize ICESCR rights to work, health, and food.<sup>376</sup>

While one can readily concur with Howse and Teitel that the ICESCR could usefully furnish substantive guidance to WTO dispute settlement panels and the Appellate Body regarding the “normative floor” or interpretive baseline to give meaning to economic, social, and cultural rights to “health,” “labor,” environmental protection, and other public policies already textually-referenced in WTO treaty provisions such as GATT Article XX, GATS Article XIV, SPS Agreement Articles 2.1 and 2.2, TBT Agreement Article 2.2, it is indeed curious, as Holgermeyer found in his survey, that States have not been marshalling ICESCR-based arguments in the WTO dispute settlement process, and that likewise, tribunals have not been independently referring to the ICESCR for purposes of treaty interpretation. It is quite possible that this is a phenomenon that could have arisen due to early difficulties in framing the ICESCR-based justification within the context of litigated issues in a trade dispute. Over a decade ago, Jose Alvarez pointed out several difficulties in setting up the ICESCR-driven interpretation of trade treaty norms within the framework of a WTO litigation as the authoritative method of interpretation:<sup>377</sup> (1) the ICESCR is not a treaty that subordinates WTO treaties, in the sense of normative hierarchy provided for in Article 103 of the U.N. Charter;<sup>378</sup> (2) the ICESCR does not speak to the issue of NGO participation within the WTO (which, at that time, was the immediate policy debate);<sup>379</sup> (3) *lex specialis* rules militate against automatically applying human rights norms to avail of treaty-based remedies;<sup>380</sup> and (4) the lack of precision of ICESCR obligations that make their application in adjudicatory settings difficult.<sup>381</sup> To the extent that States have preferred to hew more closely to WTO treaty language and the body of DSU jurisprudence interpreting such language, the present dearth of ICESCR references is quite understandable.

However, it is also possible that States have had some difficulty in marshalling ICESCR-based arguments in trade disputes over the last thirty years, precisely because the substantive content of ICESCR rights was still in the process of development by the Committee on Economic, Social, and Cultural Rights (hereafter, the “Committee”) at the same time. Unlike other human rights treaty monitoring bodies in the U.N.

---

376. *Id.* at 50–68.

377. Jose E. Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L. SYMP. J. 1, 5 (2001).

378. *Id.* at 6–7.

379. *Id.* at 8.

380. *Id.* at 9–10.

381. *Id.* at 11–12.

system, the Committee<sup>382</sup> is a creation of the Economic and Social Council—the latter being the actual body specifically designated under the ICESCR to conduct treaty monitoring, manage the State reporting process, and issue recommendations to the General Assembly on measures taken and progress made to achieve compliance with the ICESCR.<sup>383</sup> The Committee has thus far issued only 21 General Comments between 1989 to 2009, with those most pertinent to the interpretation of public policy objectives in WTO treaties (such as the right to take part in cultural life,<sup>384</sup> the right to work,<sup>385</sup> non-discrimination<sup>386</sup> and equal rights to enjoy all economic, social and cultural rights,<sup>387</sup> right to water,<sup>388</sup> right to highest attainable standard of health<sup>389</sup>) issued only within the last decade. Neither has it been able to develop its own “jurisprudence” through an inter-State or individual communications or complaints mechanism. The Optional Protocol to the ICESCR, which creates that precise mechanism for individuals or groups asserting violations of their ICESCR rights, was only concluded by General Assembly resolution in 2008,<sup>390</sup> and entered into force only on February 5, 2013 after having achieved the tenth ratification (from Uruguay) necessary for the Optional Protocol to enter into force.<sup>391</sup> One thus cannot rule out the future possibility of State recourse to the ICESCR, especially as the Committee takes on a broader function in providing authoritative guidance, not just in the State reportage system but now adjudicating issues that apply the ICESCR in the individual communications procedure. In any event, using the ICESCR in multiple avenues in WTO law is a matter of framing the former properly into the

---

382. ESCOR Res. 1985/17, U.N. Doc. E/RES/1985/17 (May 28, 1985).

383. International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966) arts. 18–19 [hereinafter ICESCR].

384. Comm. on Econ., Soc. & Cultural Rights, Gen. Comment No. 21, U.N. Doc. E/C.12/GC/21 (2009).

385. Comm. on Econ., Soc. & Cultural Rights, Gen. Comment No. 18, U.N. Doc. E/C.12/GC/18 (2005).

386. Comm. on Econ., Soc. & Cultural Rights, Gen. Comment No. 20, U.N. Doc. E/C.12/GC/20 (2009).

387. Comm. on Econ., Soc. & Cultural Rights, Gen. Comment No. 16, U.N. Doc. E/C.12/2005/3 (2005).

388. Comm. on Econ., Soc. & Cultural Rights, Gen. Comment No. 15, U.N. Doc. E/C.12/2002/11 (2002).

389. Comm. on Econ., Soc. & Cultural Rights, Gen. Comment No. 14, U.N. Doc. E/C.12/2000/4 (2000).

390. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 63/117, U.N. Doc. A/RES/63/117 (Dec. 10, 2008).

391. See Statement, Assistant Secretary-General Ivan Simonovic, Deposit of the 10th instrument of ratification of the OP-ICESCR (Feb. 5, 2013), <http://www.ohchr.org/Documents/HRBodies/CESCR/ASGStatement10thRatification.doc>.

latter, from interpretively testing the permeable public policy language in the WTO treaties and agreements,<sup>392</sup> to plumbing the numerous sources of WTO law which include not just WTO treaties but also acts of WTO organs (including waivers and decisions of specialized WTO committees, Ministerial Conference or General Council interpretations of WTO agreements, and DSB adoptions of Appellate Body and panel reports) as well as the canonical sources of general international law.<sup>393</sup> As rightly observed in a report to the Economic and Social Council, “[t]he WTO Agreements do not say anything about the type of policies which a government may wish to implement to bring about the fulfillment of human rights . . .”<sup>394</sup>

### B. ICESCR and Investment Law

Similar to WTO law, the ICESCR has not yet been invoked in investor-State disputes as an independent justification for a State’s exercise of regulatory freedom, or for the framing of host State policies under an IIA. Mediating the ICESCR into investment law will not be framed in the same way as shown in the previous section in WTO law. Unlike WTO law that has treaty texts, sources of law, and an interpretive and institutional *acquis* that could be harnessed to infuse ICESCR-based substantive and interpretive content to the public policy language in WTO treaties and the acts of the WTO political organs, the international investment law system, as demonstrated in Part II, does not have these textual and institutional gateways.

In other works,<sup>395</sup> I have shown several limitations to, and prospects of, using the ICESCR as an independent normative defense against international investment treaty obligations: (1) a host State prioritizing the ICESCR obligation over an investment treaty obligation finds little practical utility in the *lex posterior* rule on conflict of treaties codified in Article 30 of the Vienna Convention on the Law of Treaties; (2) using the ICESCR as a “relevant rule of international law” within Article 31(3)(c) of the Vienna Convention Law of Treaties could apply in “legality clauses,” where it can be shown that the ICESCR is part of the corpus of host State laws that should be complied with to qualify an “investment” as one covered by the protections of an investment treaty;

---

392. See, e.g., exceptions clauses in GATT, art. XX.; SPS arts. 2.1–2.2; TBT Agreement art. 2.2; and the safeguard provisions in GATT arts. VI, XII, XVIII, XIX, XXVIII, & XXV.

393. PAUWELYN, *supra* note 74, at 40–51, 459–60.

394. Hoe Lim, *Trade and Human Rights: What’s at Issue?* (Working paper submitted to ESCOR on Substantive Issues Arising in the Implementation of the IESCR: International Consultation ‘Economic, Social and Cultural Rights in the Development Activities of International Institutions’ Organized in Co-operation with the High Council for International Cooperation, U.N. Doc. E/C.12/2001/WP.2) (Apr. 10, 2001).

395. See generally *supra* note 132.

and (3) in a situation (such as an economic crisis) where neither the ICESCR obligation nor the investment treaty obligation can be performed completely without undermining or imperiling the other, the authoritative decision-maker has to embrace the “principle of political decision” and clarify its decision-making calculus to assess which “breach” it would incur given the consequences of international responsibility arising from the breach of either obligation, the institutional and political dynamics of relevant internal and external constituencies, as well as the community expectations unique to the host State. A political decision to “breach” an investment treaty obligation to provide compensation, for example, could be better managed if that State’s authoritative decision-makers could accurately forecast the commercial and political risks of the arbitral process, the likelihood of economic recovery and its estimated duration, and the margins of tolerance of the domestic and international political elites for a host State deliberately choosing this breach.

Given the diffuse (and mostly unreformed or amended) language of international investment agreements (IIAs), the diversity of its communities of law-appliers, and the lack of a centralizing political organ (such as the WTO) that could facilitate dialogue on ICESCR compliance within the design of IIAs, I anticipate that much of the efforts (at least in the short-term) towards designing IIAs with a view to ensuring ICESCR compliance would very likely be unilateral (at best regional) initiatives, set in accordance with the negotiation timetables of individual States, their respective political preferences and foreign policy agendas, and the nature of their current level of ICESCR compliance as ascertained under the State reporting process facilitated by the Committee. To this end, Bruno Simma and I have recommended that the Committee take on a more involved role in aiding unilateral State efforts to maintain ICESCR compliance alongside the design and implementation of their IIAs: (1) the Committee could extend technical assistance to States negotiating or designing IIAs, model investment contracts, template prospectuses, terms of reference and other significant due diligence documentation for foreign investment contracts; (2) the Committee could assist host States in designing an ICESCR impact assessment method that could be applied during the negotiation process between foreign investors and host States; (3) the Committee could contribute its legal analysis as a distinct kind of *amicus* to investor-State arbitrations that involve complex public interests and ICESCR rights; (4) the Committee could contribute its fact-finding reports in the investor-State arbitral process, insofar as ICESCR-related conduct of host States and/or investors are concerned (and with the Optional Protocol to the ICESCR having entered into force on February 5, 2013, the Committee has the functional capacity to



conduct such fact-finding); and (5) the information available under the Committee's State reporting process and periodic review could be made accessible to determine and anticipate the State's institutional capacities and resource constraints insofar as ICESCR compliance is concerned, leading to a better understanding of the risk parameters of an investment.<sup>396</sup>

I have also proposed recently<sup>397</sup> that the ICESCR might be strategically deployed in a contextual manner—to redefine the regulatory risks of an investment in ways that are more in accord with a State's economic and social realities and institutional constraints. I showed how the due diligence process can be revised to identify areas of host State policy flexibility that should already be anticipated during the life of an investment as part of ICESCR compliance, especially with host States' ICESCR compliance increasingly being susceptible to empirical investigation and inclusion in investors' regulatory risk assessments. The assessment of regulatory risks in the due diligence process should also consider the actual ICESCR impacts on specific forms of investment. I also contended that the ICESCR may have an interpretive function for IIA standards of treatment where a textual nexus is established, and in the alternative, the ICESCR may also have a significant adjusting impact to the process of valuing compensation.<sup>398</sup> Finally, I have also submitted that where an investor's home State is a party both to the ICESCR as well as to an IIA, such State assumes counterpart duties to ensure the extraterritorial application of the ICESCR, including in particular the duty to ensure that its (natural or juridical) nationals do not act in ways that cause other States to violate the fundamental obligation to "respect," "protect" or "fulfill" ICESCR rights. Even if they do not participate in the investor-State dispute settlement mechanism, home States still have significant roles to play in voluntarily ensuring ICESCR compliance within the international investment treaty system, by continuing to exercise some oversight authority over the conduct of their nationals in other States. Regulatory predictability does not equate to static host State regulations, and investors cannot easily assume that legislation and regulations at the time of the establishment of an investment will remain, and be implemented in, completely the same manner, in perpetuity. The ordinary workings of government recognize adaptation, amendment,

---

396. Simma & Desierto, *supra* note 345, at 4–6.

397. Desierto, *supra* note 345, at 92–114.

398. For new proposals to recast the valuation process, see Desierto, *supra* note 306; for a new mathematical model recasting the Capital Asset Pricing Model used in investor-State arbitrations to take into account ICESCR compliance, see Diane A. Desierto & Desiree A. Desierto, *Investment Pricing and Social Protection: A Proposal for an ICESCR-Adjusted Capital Asset Pricing Model*, 28 ICSID REV. 405 (2013).

and change, and what is most important is to establish a legal framework within which the investor can adequately, sufficiently, and transparently track and predict such regulatory changes as would affect the investment. It is in this light that I propose that the expected policy uncertainty arising from host States' compliance with dynamic ICESCR obligations be embraced, and framed uniquely, for international investment law.

### CONCLUSION: RESTRAINING A FORCED JOINDER

There will always be a seductive resonance to having a unifying "principle of systemic integration"—the idea that "[r]eference to other rules of international law in the course of interpreting a treaty is an everyday, often unconscious, part of the interpretation process."<sup>399</sup> Some years ago, then-President of the International Court of Justice Dame Rosalyn Higgins cautioned that "we should not exaggerate the phenomenon of fragmentation," and said that she was "skeptical" that the invocation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties "is the overall answer to systemic fragmentation," because it "brings with it as many problems as it resolves."<sup>400</sup> This caution holds true for the proposition that WTO law is somehow always instructive for investment law, especially for the latter's issues on State regulatory freedom to vindicate public policies. Caution is justified—even inevitable—given the contemporary reality of how States thus far have chosen to bind themselves to observe different types of conduct across various spheres of international economic relations. Left unproven, the assumption that States intend economic transactions governed in one sphere to be equally, identically, or similarly governed for another economic transaction, and that they also intend their agents (courts, tribunals, political bodies) to look beyond the immediate rules States establish to govern a particular economic transaction, can wield havoc and instability to functional decision-making processes that have been purposely designed and built into distinct treaty systems. Not only is this a question of "fit," but more importantly, it is a question of "outcome." Grafting WTO law into investment law does not ensure that the public policy problems in the latter would indeed be successfully resolved.

At this point, it should also be clear that mere normative or transactional resemblance does not provide satisfactory criteria for

---

399. Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279, 280 (2005).

400. Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 INT'L & COMP. L.Q. 791, 796, 803–04 (2006).

transposing WTO law into investment law. As this Article has shown, the public policy language in WTO treaties, and corresponding DSB interpretations, collectively evolved according to a specific internal logic that bridges a “non-trade concern” (e.g., human rights compliance) to a trade liberalization and market access objective. This logic developed in tandem with sociological and ideological shifts within the WTO community—expectations of State regulatory freedom, as such, are shaped by what the WTO Member States have negotiated amongst themselves, and what public policy issues WTO Member States have also been pressed to respond to within the political levers of the WTO institutional machinery. Waivers for establishing a certification process for conflict diamonds and for enabling access to essential medicines through compulsory licensing represent hard-fought political battles within the WTO system, but they do not encompass the full range of human rights concerns that States may harbor when they seek to defend their policy spaces. As such, what States may understand by “necessity” in relation to a domestic policy measure asserted against a market access commitment, is not automatically what they may understand when they design a “necessary measure or measure not precluded” for an investment transaction within their own jurisdiction. The institutional and interpretive complexity in WTO law has to be fully grasped and engaged, to enable one to draw feasible, transparent, and acceptable criteria for the latter’s effective infusion into investment law to accomplish a shared objective of human rights compliance. The responsibilities of treaty negotiators, State policy-makers, law-appliers, and other authoritative decision-makers demand no less than a sustained effort to wed doctrinal rigor with our political sensibilities.

To date, the WTO law *qua* investment law proposition remains a forced joinder of treaty regimes and institutions that does not serve the broader objective of reaching better-considered defenses that uphold a State’s regulatory freedom to vindicate public policy or human rights concerns. At best, the proposition gives us a straw argument that may appear to contribute policy analysis, but ultimately paralyzes us from thinking more laterally and deeply on the actual reform processes and suitable proposals for international investment law to accommodate and fully engage public policy and human rights alongside investment obligations. It should be a sobering reality that human rights and public policies in the trading system remain very much a work in progress, and advocates themselves concede that their strategic success depends on their effective understanding and creative use of WTO institutions, processes, interests, and constituencies. That is one analogy we can helpfully adopt as we design and tailor our public policy solutions for States, individuals, and groups in the diverse, diffuse, and dispersed international investment system.

